97

(1)

Supreme Court, U.S.
FILED

07 16 03 JUN 23 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No. _____

In The
Supreme Court of the United States

HOWARD CASPER,

Petitioner,

v.

SMG (formerly known as Spectacor Management Group), ROBERT MCCLINTOCK, AND SOUTH JERSEY REGIONAL COUNCIL OF CARPENTERS, LOCAL 623,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRITT OF CERTIORARI

GARY GREEN
Counsel of Record
SIDKOFF, PINCUS & GREEN, P.C.
2700 ARAMARK TOWER
1101 MARKET STREET
PHILADELPHIA, PA 19107
TELEPHONE: (215) 574-0600
FACSIMILE: (215) 574-0310

Attorney for Petitioner

June 23, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

This Petition involves an antitrust claim that stems from a conspiracy between Respondents, who are a labor union and the manager of a convention center, to restrain competition for trade show labor in southern New Jersey. Petitioner, a trade show contractor who buys and sells trade show labor, suffered monetary damages as a result of Respondents' conspiracy in which a less efficient union conspired to restrain the business market for trade show labor by indiscriminately excluding from the market those contractors whose own workforces were more efficient.

Respondents did not challenge the anticompetitive nature of their actions by raising the statutory labor exemption, and in a prior separate action involving the same parties, the actions of Respondents were held to be unrelated to work preservation and in violation of § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) ("§ 8(e)"). Petitioner analogized its antitrust claim to that of authoritative antitrust labor cases where § 8(e) violations existed and the statutory labor exemption was held to be inapplicable, and argued that antitrust standing should be inherent in these situations.

This Court has yet to decide an antitrust labor case on the issue of standing. The District Court opined that Petitioner's reliance on authoritative antitrust labor cases was not just misplaced, but that those cases have been overruled. On appeal, the United States Court of Appeals for the Third Circuit affirmed that ruling, applying non-labor law cases to support the decision that Petitioner did not have standing.

The questions presented in this Petition are accordingly:

Whether labor antitrust cases are a unique species, deserving of a separate analysis in determining antitrust standing?

Whether the lower courts in this case have decided an important federal question in a manner that conflicts with relevant decisions of this Court relating to antitrust standing?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, Howard Casper, an individual, was substituted for Atlantic Exposition Services, Inc. ("AES") following a ruling by the National Labor Relations Board which was affirmed by the United States Court of Appeals for the Third Circuit. Respondents are SMG (formerly known as Spectacor Management Group), Robert McClintock and South Jersey Regional Council of Carpenters, Local 623.

Pursuant to Supreme Court Rule 29.6, Petitioner makes the following disclosure:

There is no parent or publicly held company owning 10% or more of Atlantic Exposition Services, Inc.'s stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

INTRODUCTORY PRAYER 1

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT STATUTES 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION .. 10

I. Where, As Here, Conduct Taken Pursuant to A Collective Bargaining Agreement Has Been Judged to Be Illegal Under Federal Labor Law, A Secondary Party Injured In His Business or Property Also Makes Out a Prima Facie Case Under Antitrust Law. 11

II. Antitrust Injury Should be Recognized as an Inherent Component of Antitrust Labor Cases in Situations where the Labor Exemption does not Apply. 15

III. This Court Has Established Independent Grounds for Antitrust Standing Which Were Not Followed by the Lower Courts. 19

CONCLUSION 22

APPENDIX

Appendix A: January 28, 2008 Third Circuit Opinion and Judgment 1a

Appendix B: October 31, 2006 District Court Opinion 11a

Appendix C: February 13, 2003 Third Circuit Opinion 34a

Appendix D: August 27, 2001 Decision and Order by National Labor Relations Board .. 57a

Appendix E: February 22, 2001 District Court Order 103a

Appendix F: March 25, 2008 Third Circuit Order denying Sur Petition for Panel Rehearing 105a

TABLE OF AUTHORITIES

CASES

Allen Bradley Co. v. Local Union No. 3, IBEW,
325 U.S. 797 (1945) 14

Apex Hosiery Co. v. Leader,
310 U.S. 469 (1940) 11

Assoc. Gen. Contractors of California, Inc. v. California State Council of Carpenters,
459 U.S. 519 (1983) 21

Blue Shield of Virginia v. McCready,
457 U.S. 465 (1982) 10, 19, 20, 21, 22

Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.,
123 F.Supp.2d 245 (D.N.J. 2000) 21

Carpet Group Int'l v. Oriental Rug Importers Ass'n,
227 F.3d 62 (3rd Cir. 2000) 21, 22

City of Pittsburgh v. West Penn Power Co.,
147 F.3d 256 (3rd Cir. 1998) 13

Connell Construction Co. v. Plumbers and Steamfitters Local Union,
421 U.S. 616 (1975) ..... *passim*

Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494 (3rd Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902 (1980) 10, 11, 12, 13, 15

Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290 (2nd Cir. 1983) 21

Jefferson Parish Hosp. v. Hyde, 466 U.S. 2 (1984) 10, 21, 22

Local Union No. 189, Amalgamated Meat Cutters, and Butcher Workmen of North America, AFL-CIO v. Jewel Tea Co., Inc., 381 U.S. 676 (1965) 12

Larry Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council, 609 F.2d 1368 (3rd Cir. 1979) 10, 15

Larry Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council, 670 F.2d 421 (3rd Cir. 1982) 10, 15

National Collegiate Athletic Assn v. Board of Regents of the University of Okalahoma, 468 U.S. 85 (1984) 13

National Woodwork Manufacturers Ass'n v. NLRB, 386 U.S. 612 (1967) 11

Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912 (3rd Cir. 1999) 21

United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) 14

STATUTES

15 U.S.C. § 1 ..... 2, 3, 6

28 U.S.C. § 1254(1) 2

29 U.S.C. § 158(e) 3, 4

RULES

Sup. Ct. R. 13.1 2

Sup. Ct. R. 13.3 2

Sup. Ct. R. 29.6 iii

INTRODUCTORY PRAYER

Petitioner respectfully petitions this Court for a Writ of Certiorari to review the January 28, 2008 Judgment and Opinion and the March 25, 2008 Order of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Decision and Order of the National Labor Relations Board, dated August 27, 2001, is reported at 335 NLRB No. 49, 335 NLRB 586, 2001 WL 1022053 and is reproduced in Appendix D on pages 57a-102a. The Opinion of the United States Court of Appeals for the Third Circuit, filed on February 13, 2003, denying the petition for review of the National Labor Relations Board's findings and granting the Board's cross-application for enforcement of its Order, is reported at 320 F.3d 385, and is reproduced in Appendix C on pages 34a-56a. The Order and Opinion of the United States District Court for the District of New Jersey, dated October 31, 2006, granting Summary Judgment in favor of Respondents is unpublished, but unofficially reported at 2006 WL 3111132 and is reproduced in Appendix B on pages 11a-33a. The Judgment and Opinion of the United States Court of Appeals for the Third Circuit, filed on January 28, 2008, affirming the District Court's grant of Summary Judgment is unpublished, but unofficially reported at 262 Fed.Appx. 449, 2008 WL 227854 and is reproduced in Appendix A on pages 1a-10a. The Order of the United States Court of Appeals for the Third Circuit, filed on March 25, 2008, denying the Petition for Panel

Rehearing is reproduced in Appendix F on pages 105a-106a.

JURISDICTION

This action originated in the United States District Court for the District of New Jersey. An Order staying the action pending the resolution of the matter brought before the National Labor Relations Board was entered on February 22, 2001. Following the ruling of the National Labor Relations Board on August 27, 2001, the United States Court of Appeals for the Third Circuit, in an Opinion issued February 13, 2003, denied a petition for review of the National Labor Relations Board's findings and granted the Board's cross-application for enforcement of its Order. Thereafter, the United States District Court for the District of New Jersey reopened the action and on October 31, 2006, granted Summary Judgment in favor of Respondents. The Judgment of the United States Court of Appeals for the Third Circuit affirming the lower court's grant of Summary Judgment was entered on January 28, 2008. A timely Petition for Panel Rehearing was denied on March 25, 2008. This Petition is timely filed according to Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES

§ 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, provides that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade

or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

§ 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), provides as follows:

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or

repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

STATEMENT OF THE CASE

In 1998, Atlantic Exposition Services ("AES") filed a complaint with the National Labor Relations Board ("NLRB"), in an effort to have an agreement between the Respondents, SMG and South Jersey Regional Council of Carpenters, Local 623 ("Carpenters"), ruled in violation of § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e)[1] ("§ 8(e)"). (Appendix B, pp. 11a - 14a). Under that agreement, which was entered into on April 15, 1996 ("April 15th Agreement") SMG, the private management company for the Atlantic City

---

[1] 29 U.S.C. § 158(e) prohibits labor agreements by virtue of which an employer ceases to deal with another employer.

Convention Center ("ACCC"), agreed that if it chose to subcontract out certain work (herein referred to as "Trade Show Work"), the Trade Show Work would *only* be subcontracted to companies (herein referred to as "Show Contractors") having collective bargaining agreements with Carpenters. *Id.*

AES is a Show Contractor that works out of Atlantic City, New Jersey and is in the business of buying and re-packaging show labor (a majority of which is performed at the ACCC) to show exhibitors. (Appendix B, p. 13a). AES refused to sign a collective bargaining agreement with the Carpenters, primarily because it had already signed a collective bargaining agreement with the cheaper and more efficient Painters Union. (Appendix C, p. 40a).

AES prevailed in its claim against Respondents before the NLRB and that decision was affirmed by the United States Court of Appeals for the Third Circuit. (Appendix C). Specifically, the Third Circuit declared that the April 15th Agreement violated § 8(e) in that SMG sought to regulate the labor policies of neutral employers such as AES by requiring them to contract with Carpenters at the ACCC after SMG had removed itself from the role of employer; and that the work covered by the April 15th Agreement was not protected by the "construction industry proviso" to § 8(e). (Appendix C, pp. 46a - 49a).

In 2000, AES filed an antitrust action against Respondents in the United States District Court for the District of New Jersey, alleging, *inter alia*,

antitrust damages[2] under the Sherman Act, 15 U.S.C. § 1. AES assigned its interest in the litigation to Petitioner Howard Casper, a former principal of AES. (Appendix B, p. 13a).

Petitioner alleged, and the District Court accepted for purposes of Summary Judgment, that in effecting the April 15th Agreement, Respondents had indeed conspired to gain a competitive advantage in their respective fields. (Appendix B, p. 20a, fn. 11). Specifically, SMG sought a competitive advantage over competing venues for small shows in southern New Jersey, and Carpenters sought a monopoly in all show venues throughout the seven southern counties of New Jersey, which encompassed the ACCC ("7 Counties"). (Appendix B, pp. 19a - 20a; Appendix C, pp. 39a - 40a).

Before the April 15th Agreement was entered into, SMG directly employed trade show work at the ACCC, and no trade show work was subcontracted to Show Contractors. (Appendix B, p. 14a). In 1983, the ACCC and Carpenters signed a collective bargaining agreement that obligated SMG to exclusively employ Carpenters, and imposed on SMG oppressive work rules, rates and terms for show work at the ACCC (herein referred to as "1983 Oppressive Terms"). (Appendix B, pp. 14a - 16a). SMG profited from this relationship by selling Carpenters' labor to Show Producers at a marked up price. However, the 1983

---

[2] The relevant liability period is from October 1, 1998 (when SMG required AES to use Carpenters labor in the ACCC) to February 13, 2003 (when the Third Circuit affirmed the NLRB's decision). (Appendix B, p. 14a).

Oppressive Terms were "quite onerous", as noted by the District Court, and were bad for its business because they repelled show managers and exhibitors from choosing the ACCC as a forum for their shows. (Appendix B, pp. 14a - 16a).

These factors motivated SMG to formulate the conspiracy that produced the April 15th Agreement, under which: (1) SMG would cease employing Carpenters at the ACCC; (2) Carpenters would offer better terms to Show Contractors who signed Carpenters' collective bargaining agreement, which encompassed the seven southern counties of New Jersey ("Carpenters' 7 County Agreement"); (3) SMG would leverage the ACCC's power in the Atlantic City market to force show contractors to use Carpenters throughout the 7 Counties; and (4) to coerce show contractors to sign Carpenters' 7 County Agreement, SMG would require non-signatories to rent Carpenters from SMG under the abandoned, 1983 Oppressive Terms. (Appendix B, pp. 17a - 18a).

As discussed by the District Court, Petitioner's proof of Respondents' conspiracy was based, in part, on evidence that *SMG* had actually suggested the idea to Carpenters that their collective bargaining agreement with Show Contractors lock in all work within the 7 Counties. (Appendix B, p. 18a). Carpenters' 7 County Agreement benefited SMG because, up to that point, Show Contractors were not locked into all 7 Counties, and therefore, they had the benefit of being able to use cheaper and more efficient labor, such as Painters Union, at competing venues of the ACCC. (Appendix B, pp. 17a - 21a).

Accordingly, there were two separate forces that motivated SMG to enter into its conspiracy with Carpenters. *First*, SMG desired to no longer be in the labor business or to be burdened by the 1983 Oppressive Terms. In exchange for being released from this agreement with Carpenters, SMG offered to use its leverage of the ACCC, one of the largest convention centers on the East Coast, to force Show Contractors to sign Carpenters' 7 County Agreement. *Second*, SMG wanted to become more attractive to consumers in an effort to have the ACCC be more profitable. Previously, SMG had been plagued as the manager of the ACCC by the 1983 Oppressive Terms. This often forced consumers to use other small show venues, such as hotels and casinos. SMG therefore desired to have competitors of the ACCC afflicted by the same labor monstrosity it was forced to deal with[3], namely Carpenters' labor, and it conspired with Carpenters to accomplish this goal by forcing the Trade Show Contractors who signed up with Carpenters to also sign Carpenters' 7 County Agreement. (Appendix B, pp. 17a - 18a, 20a - 21a).

The conspiracy succeeded because the ACCC was one of the 30 largest convention centers in the United States and was the lone venue in southern New Jersey that had the facilities and space to handle *large* trade shows. (Appendix B, pp. 14a, 17a - 18a, 20a, fn. 12). Accordingly, most Show Contractors were compelled to

---

[3] The April 15th Agreement offered less oppressive terms than the 1983 Agreement by, *inter alia*, having Carpenters give up certain benefits such as double-time pay on Saturdays and offering more favorable work rules. (Appendix B, p. 18a).

sign Carpenters' 7 County Agreement, despite the fact that prior to the conspiracy, no Show Contractor had signed a collective bargaining agreement with Carpenters. (Appendix B, pp. 14a, 17a - 18a; Appendix C, pp. 39a - 40a).

Although the ACCC accounted for roughly half of AES' yearly revenues and a majority of its profits, it did not sign Carpenters' 7 County Agreement because of its existing collective bargaining agreement with Painters Union. (Appendix C, pp. 39a - 40a). As a result, if AES wanted to do business at the ACCC, which was its economic lifeblood, it had to use Carpenters labor at the rate of the 1983 Oppressive Terms. Accordingly, AES was at a distinct competitive disadvantage in the ACCC, and it incurred economic losses because almost every local Show Contractor had signed the Carpenters' 7 County Agreement, and therefore, had obtained (and repackaged/resold) Carpenters labor at a much lower rate. (Appendix B, pp. 16a - 18a).

Petitioner's action alleged that Respondents' conspiracy was achieved by violating § 1 of the Sherman Act in that Respondents' conduct amounted to an illegal "Tying Arrangement" and an unlawful "Refusal to Deal". (Appendix B, pp. 20a - 21a). The District Court granted Summary Judgment in favor of Respondents, declining to consider Petitioner's substantive antitrust grounds, but instead, holding that Petitioner could not show an "antitrust injury" and thus lacked antitrust standing to bring a § 1 claim. (Appendix B, pp. 21a - 31a). The District Court stated that the five Supreme Court and Third Circuit

cases that were principally relied upon by Petitioner[4] were inapplicable because they predated *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2 (1984) ("*Jefferson Parish*") and "the many Third Circuit cases that have since applied and refined the standing analysis". (Appendix B, p. 28a, fn. 19). Four of the five cases cited by Petitioner that were rejected by the District Court were Supreme Court and Third Circuit antitrust *labor* cases, and none of the cases cited by the District Court in support of its Opinion were antitrust labor cases, including *Jefferson Parish*. The Third Circuit affirmed the District Court's ruling and issued its own Opinion on January 28, 2008, in which it too eschewed any discussion of antitrust labor cases. (Appendix A, pp. 1a - 10a). Petitioner was denied a Panel Rehearing by the Third Circuit on March 25, 2008. (Appendix F).

REASONS FOR GRANTING THE PETITION

Petitioner requests a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Third Circuit wherein that court affirmed the District Court's finding that Petitioner could not establish antitrust standing.

---

[4] *See, Connell Construction Co. v. Plumbers and Steamfitters Local Union*, 421 U.S. 616 (1975) ("*Connell*"); *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494 (3rd Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902 (1980) ("*Conex*"); *Larry Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council*, 609 F.2d 1368 (3rd Cir. 1979) ("*Muko I*"); *Larry Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council*, 670 F.2d 421 (3rd Cir. 1982) ("*Muko II*"); and *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) ("*McCready*").

I. Where, As Here, Conduct Taken Pursuant to A Collective Bargaining Agreement Has Been Judged to Be Illegal Under Federal Labor Law, A Secondary Party Injured In His Business or Property Also Makes Out a Prima Facie Case Under Antitrust Law.

The NLRB and the Third Circuit ruled that SMG's arbitrary insistence that Show Contractors sign a collective bargaining agreement with Carpenters as a condition of being allowed to work in the ACCC was not work preservation, but rather, was *carried on for its effect elsewhere*[5]. (Appendix C). Illegal secondary activity of this kind has long been held to be subject to Sherman Act sanctions and immune from the protection of national labor policy. *See, Connell*, 421 U.S. at 625-26; *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 628-30 (1967); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 505-06 (1940).

While Petitioner does not assert that a judgment under § 8(e) automatically equates to a violation under § 1 of the Sherman Act, where a party demonstrates economic injury as a result of such illegal conduct, it has satisfied its burden of establishing a prima facie case for antitrust injury. In *Conex*, *supra,* the plaintiffs were non-union, off-pier consolidators. The Stevedores Union and an association of freight companies formed an agreement to bar shippers from using the plaintiffs' services (herein referred to as the "Dublin Supplement"). The NLRB found the Dublin

---

[5] By "elsewhere", we mean the "7 Counties" of southern New Jersey. *See,* discussion, *supra.*

Supplement to be in violation of § 8(e), and the plaintiffs brought a Sherman Act suit that alleged a *per se* violation.

As a result of the federal labor violation, the Third Circuit in *Conex* noted that the "anticompetitive effect of the enforcement of [the defendants' agreement] is on this record undisputed." *Id.* at 518. The court also found an injury to competition because the Dublin Supplement "exerted a substantial upward pressure upon the price of container shipping." *Id.* Accordingly, the Third Circuit found both *anticompetitive impact* and *anticompetitive effects,* and held that this type of conduct amounted to a *per se* violation under the antitrust laws.[6] *Id.* at 522.

Here, Respondents' § 8(e) violation has a direct and inescapable correlation with antitrust analysis. In *Conex*, as in the instant action before the NLRB (whose ruling was affirmed by the Third Circuit), the Third Circuit held:

> A further consequence of the NLRB's factual determination, in the antitrust context, is suggested in Justice Brennan's *National Woodwork* discussion: 'In effect Congress, in

---

[6] As a result of this finding, the Third Circuit in *Conex* reasoned that if the matter had been brought for injunctive relief, the Supreme Court's decision in *Connell, supra,* and *Local Union No. 189, Amalgamated Meat Cutters, and Butcher Workmen of North America, AFL-CIO v. Jewel Tea Co., Inc.*, 381 U.S. 676 (1965) would have led to a ruling that a § 8(e) violation automatically disposes of a claim for labor exemption under the antitrust laws. *Id.* at 518.

> enacting § 8(b)(4)(A) of the Act (the statutory predecessor of § 8(e)), returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co.*, *supra*, and barred as a secondary boycott union activity directed against a neutral employer, including the immediate employer **when in fact the activity directed against him was carried on for its effect elsewhere.'**

Conex, 602 F.2d at 513 (emphasis added).

The key element in both *Conex* and this case is that a judicial determination was made that anticompetitive behavior in the form of a secondary boycott was directed at innocent third parties who made unchallenged claims for economic damages resulting from the wrongful conduct.

In determining antitrust injury, courts must look to whether the injury flows from that which makes the defendant's acts unlawful. *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 266 (3rd Cir. 1998). Unquestionably, such an injury has been shown in this case, where the conduct that was the subject of the antitrust action was determined to have been both illegal and anticompetitive. These pernicious effects are precisely the sort of harm antitrust law is intended to prevent. *See, National Collegiate Athletic Assn v. Board of Regents of the University of Okalahoma*, 468 U.S. 85, 107 (1984).

Moreover, the rationale adopted by both the District Court and the Third Circuit in this case - that Petitioner's defined relevant geographic market (which

was judged to be too narrow) prohibited Petitioner from establishing antitrust injury – is illogical in the context of an *antirust labor* case. This Court has recognized that federal labor law gives unions a coercive power that, if abused, can undermine the goals and protections of the antitrust laws. *See, Connell*, 421 U.S. 616 (1975); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U.S. 797 (1945). In these cases, this Court has carved out a non-statutory labor exemption to protect the legitimate restraints imposed in the interest of *lawful* union monopoly power in the labor market. *See, Id.*

Here, the non-statutory labor exemption was not a factor in the lower courts' rulings and was not raised by Respondents in their Motion for Summary Judgment. However, it is crucially important to this Petition that such an exemption exists to protect lawful union activity. Hence, because this Court has recognized the unique power afforded to unions by federal labor law, yet still affords unions the added protection of a specific labor exemption to antitrust law, it would be inequitable in cases where the exemption is not a factor to treat the inherent power and force of unions in the labor market as a non-issue.

It was undisputed that Petitioner suffered lost profits as a result of Respondents' anticompetitive conduct judged to be illegal under the labor laws. (Appendix B, pp. 18a - 19a; Appendix C). However, the Third Circuit, having failed to receive specific guidance from this Court on the issue of antitrust standing with respect to labor cases, declined to view antitrust labor cases as a unique species and rejected Petitioner's

assertion that the relevant market should be defined as the area where the union wielded its power.

II. Antitrust Injury Should be Recognized as an Inherent Component of Antitrust Labor Cases in Situations where the Labor Exemption does not Apply.

This is an antitrust case in which a labor union used its powerful status to pressure SMG, its co-conspirator, into devising an anticompetitive scheme (the April 15th Agreement) that gave Carpenters more business outside of the ACCC, and benefited SMG by liberating it from the 1983 Oppressive Terms. SMG used the monopoly of the ACCC to "palm off" Carpenters to Show Contractors, and used the opportunity to its own advantage to enhance its ability to compete for smaller shows within Atlantic City. (Appendix B, pp. 20a - 21a). This Court and the Third Circuit have ruled that factually similar union and non-employer concerted actions can cause injury to competition. *See, Connell*, 421 U.S. 616; *Conex*, 602 F.2d 494; *Muko I*, 609 F.2d 1368; *Muko II*, 670 F.2d 421.

In *Connell*, this Court discussed the type of injury to competition that ordinarily ensues when a union conspires to restrain competition in a business market. *Connell* involved a union that picketed a building contractor to compel it to deal only with subcontractors that had signed on with the union. As in our case, the union had no relevant labor relationship to justify its action. This Court in *Connell* held that where a *less efficient union* used direct restraint on the business market of a non-employer, that action by the union

injured competition by indiscriminately excluding from the market those contractors whose own workforces were *more efficient*. 421 U.S. at 623-24. This Court in *Connell* stated that "competition based on efficiency is a positive value that the antitrust laws strive to protect," and found that in the portion of the market covered by the union's restraint, competition would be eliminated for anything covered by the union's proposed agreement. *Id.* at 623.[7]

Connell discussed additional aspects of injury to competition that grow out of a union's restraint such as the conspiracy here, noting that while only subcontractors who had an agreement with the union could be hired by the contractors, the union could unilaterally and arbitrarily reject signing on with any particular subcontractor it disfavored:

> The union thus had complete control over subcontract work offered by general contractors that had signed these agreements. Such control [*by a union*] could result in significant **adverse effects on the market** and on consumers...

Id. at 624 (emphasis added). Because the union could arbitrarily exclude subcontractors from entering the market, this Court in *Connell* declared:

---

[7] Here, the conspiracy caused the same type of injury to competition as discussed in *Connell*: it barred AES from using the more efficient Painters at the expense of a "positive value that the antitrust laws strive to protect;" and it indiscriminately excluded from the market of servicing shows at the ACCC, those contractors who did not want to use the more costly and less efficient Carpenters.

> This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy... *Id.* at 625.

In a way that was strikingly similar to the conduct this Court condemned in *Connell*, the conspiracy in our case gave Carpenters an unchecked veto over which Show Contractors would be allowed to do work in the ACCC under the more favorable conditions of Carpenters' 7 County Agreement. (Appendix B, pp. 17a - 18a). Thus, Carpenters acted arbitrarily in rejecting legitimate Show Contractors, and their decisions were subject to the whim of union officials and were implemented in an *ad hoc manner*.[8]

The concerted activities of Respondents resulted in a multitude of anticompetitive effects. For example, the less expensive, more productive Painters and other sources of labor were locked out of the ACCC completely, and were subject to being excluded from the casino hotels and throughout the rest of southern New Jersey because a majority of the local Show

---

[8] Carpenters refused to allow one Show Contractor to sign the 7 County Agreement on the capricious grounds that it did not recognize that Contractor as one of the regular contractors in Atlantic City; and Carpenters would sign on only with a company it recognized as being part of the "trade show business," meaning start-ups need not apply.

Contractors had signed Carpenters' 7 County Agreement.[9] (Appendix B, pp. 17a - 18a). In addition, buyers of show labor not only lost the right to choose who would do the work, but they along with their show producer and show exhibitor customers were stuck with paying higher prices and being governed by the less productive work rules. (Appendix B, p. 18a).

When the non-statutory labor exemption is taken off the table, the very nature of an agreement/conspiracy between a union and a non-labor party to restrain competition in a business market compels a finding of antitrust injury. The relevant market concerns expressed by the District Court and Third Circuit here were misplaced. In *Connell*, as here, the agreements with third parties did not simply prohibit subcontracting to any nonunion firm; they outlawed subcontracting to *any* firm that did not have a contract with the specific union. *Connell*, 421 U.S. at 624. This Court in *Connell* reasoned that this type of agreement gives a union complete control over which subcontractors are allowed to compete in the market. The union can arbitrarily limit the number of collective bargaining agreements it signs, and it can discriminate against subcontractors based upon any number of reasons, including geographic location. *Id.* at 624, 625. This type of unique power lends credence

---

[9] *See*, *Connell*, 421 U.S. at 625 ("[L]ocal 100, by agreement with several contractors, made nonunion subcontractors ineligible to compete for a portion of the available work. This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions.").

to Petitioner's assertion that the relevant market in an antitrust labor case should be wherever the union has wielded its authority.

III. This Court Has Established Independent Grounds for Antitrust Standing Which Were Not Followed by the Lower Courts.

In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) ("*McCready*"), this Court held that antitrust standing exists so long as the injury is "foreseeable" and the harm is a "necessary step" in the restraint of trade. This court stated in *McCready*:

> Although McCready was not a competitor of the conspirators, **the injury she suffered was inextricably intertwined** with the injury the conspirators sought to inflict on psychologists and the psychotherapy market. In light of the conspiracy here alleged we think that McCready's injury 'flows from that which makes defendants' acts unlawful' within the meaning of *Brunswick*, and falls squarely within the area of congressional concern.

Id. at 483-84 (emphasis added).

McCready teaches that a § 1 violation occurs if two or more actors combine to cause a net reduction in competition in the relevant market, and the plaintiff is proximately and directly injured financially as a result. Tellingly, this Court's labor/antitrust cases generally do not identify a species of antitrust violation such as refusal to deal or tying arrangement. *See, Connell*, 421 U.S. 616.

When *McCready* is applied to our case, it is clear "the injury [AES] suffered was inextricably intertwined with the injury the conspirators sought to inflict." AES was a party to a collective bargaining agreement with Painters Union for show labor, and was the primary enabling agent through which Painters could obtain work in the ACCC. (Appendix B, pp. 17a - 18a). If AES signed the 7 County Agreement, it would have been precluded from providing its customers the lower prices and higher productivity of Painters. (Appendix B, pp. 17a - 18a). On the other hand, by being forced to obtain Carpenters from SMG under the 1983 Labor Contract, AES would be a wounded competitor in vying for business at the ACCC. (Appendix B, pp. 17a - 18a). Without imposing a restraint on AES that would keep Painters out of the ACCC, Respondents could not attain their dual goals of increasing market share for Carpenters beyond work in the ACCC, and leveling the playing field for SMG in the market for the smaller shows that could be held in southern New Jersey venues that competed directly with the ACCC. (Appendix B, pp. 14a - 18a). In other words, the restraint on AES was the "very means" by which Respondents sought to achieve their goals, and as a result, AES was *inextricably intertwined* with the more obvious injury that Respondents sought to inflict on Painters by arbitrarily eliminating them from the ACCC. Without needing to expand the facts one iota, the logic and holding of *McCready* support and validate Petitioner's claim for antitrust standing.

This Court needs to clarify its holding in *McCready* due to the confusion that exists among the lower courts as to its application. This is particularly true in

light of *Assoc. Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"), and its progeny, including *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, where this Court conducted a different analysis for evaluating antitrust standing/injury. The confusion is exemplified by the District Court's ruling in this case which was affirmed by the Third Circuit, wherein it was determined that Petitioner's reliance upon *McCready* was misplaced because *McCready* pre-dated *Jefferson Parish*. (Appendix B, p. 28a, fn. 19).

However, contrary to the lower courts' rulings in this case, the Third Circuit in other decisions has continued to follow the law of both *AGC* and *McCready*, sometimes applying them independently and at other times applying them in conjunction with one another, depending upon the factual circumstances. *See, Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 924, fn. 6 (3rd Cir. 1999) (court analyzed standing under both *AGC* and *McCready*); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F.Supp.2d 245, 258, fn. 8 (D.N.J. 2000) (court ruled that *McCready* could be more applicable than *AGC* in cases where conspiracy is alleged).

In finding an antitrust injury in *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 77 (3rd Cir. 2000) ("*Carpet Group*"), the Third Circuit was persuaded by, and adopted Judge Friendly's analysis of *McCready* in *Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 724 F.2d 290, 294 (2nd Cir. 1983) ("*Crimpers*"); and it quoted *Crimpers* in holding that the injury in *Carpet Group* was the "precisely intended

consequence" of, and was "inextricably intertwined" with the defendants' conduct. *Carpet Group*, 227 F.2d at 78.

Clearly, if *McCready* were defined by this Court as an appropriate and independent vehicle for determining antitrust standing, the lower courts would not have been able to summarily reject Petitioner's stated grounds for standing on the basis that *AGC* and *Jefferson Parish* have "refined the standing analysis". (Appendix B, p. 28a, fn. 19). That conclusion is partly due to this Court's lack of clarification of the meaning and scope of *McCready*, including whether such an analysis may be applied independently or in place of the standards used in *AGC* and *Jefferson Parish*.

CONCLUSION

For all of the above reasons, Petitioner, Howard Casper, respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

GARY GREEN
Counsel for Petitioner
SIDKOFF, PINCUS & GREEN, P.C.
2700 Aramark Tower
1101 Market Street
Philadelphia, PA 19107
Telephone: (215) 574-0600
Facsimile: (215) 574-0310

Dated: June 23, 2008

APPENDIX

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4848

[Filed: January 28, 2008]

ATLANTIC EXPOSITION SERVICES INC.;
HOWARD CASPER,

v.

SMG, formerly known as SPECTACOR MANAGEMENT GROUP; ROBERT MCCLINTOCK; SOUTH JERSEY REGIONAL COUNCIL OF CARPENTERS, LOCAL 623.

Howard Casper,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(District Court No: 00-cv-3465)
District Judge: Joseph E. Irenas

Submitted Under Third Circuit L.A.R. 34.1(a)
November 29, 2007

Before: BARRY, FUENTES, Circuit Judges, and DIAMOND,* District Judge.

OPINION OF THE COURT

FUENTES, Circuit Judge.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant, Atlantic Exposition Services, Inc. ("Atlantic Exposition"),[1] is a trade show contractor located in Atlantic City, New Jersey, which sets up and takes down trade shows mainly at the Atlantic City Convention Center (the "Convention Center") and Atlantic City casino hotels.

The Convention Center is among the thirty largest in the country. Show producers choose among the convention centers and other venues to house their trade shows. Once a show producer chooses a location, such as the Convention Center, it signs an agreement governing its use of the space. The show producer must obtain workers to construct and dismantle the exhibit booths. Atlantic Exposition is one of many show contractors that perform that service for show producers at the Convention Center.

---

* Honorable Paul S. Diamond, District Judge for the United States District Court of the Eastern District of Pennsylvania, sitting by designation.

[1] On April 20, 2004, Atlantic Exposition withdrew its claim for injunctive relief and assigned its damage claim to its former principal, Howard Casper.

Between 1983 and 1995, the Atlantic City Convention Center Authority (the "Authority") operated and managed the Convention Center. In 1983, the Authority and a union, South Jersey Regional Council of Carpenters, Local 623 ("Carpenters"), signed a collective bargaining agreement for labor rates and terms at the Convention Center ("1983 Agreement"). During the period when the 1983 Agreement was in effect, the Authority, and then SMG, which was hired to manage the Convention Center starting in 1995, directly employed Carpenters exclusively to do the trade show work in the Convention Center, and no work was subcontracted to other show contractors. Concluding that the 1983 Agreement excluded some shows due to the high labor costs which were passed on to show producers, SMG entered into an agreement with Carpenters in April 1996 ("1996 Agreement") to obtain more favorable rates. In the 1996 Agreement, Carpenters and SMG agreed that if SMG chose to subcontract the construction of exhibit booths, it could only subcontract to companies that sign a separate collective bargaining agreement with Carpenters. That separate collective bargaining agreement required show contractors to use Carpenters for all their trade show construction needs in seven Southern New Jersey counties ("Seven County Agreement"). Atlantic Exposition refused to sign the Seven County Agreement with Carpenters. Though Atlantic Exposition was able to work in the Convention Center, it had to contract for Carpenters' labor through SMG, and abide by the unfavorable terms of the 1983 Agreement.

At issue in the instant appeal is Atlantic Exposition's claim that the 1996 Agreement violates

Section 1 of the Sherman Act, 15 U.S.C. § 1. The District Court held that Atlantic Exposition could not show that the Convention Center wielded sufficient market power to cause an antitrust injury, because it could not show that the Convention Center alone was the relevant geographic market. Concluding that the relevant market was large trade show venues in the Northeast or possibly across the United States, the District Court granted summary judgment for the defendants. For the reasons discussed below, the decision of the District Court will be affirmed.[2]

II. DISCUSSION

The Clayton Act permits private enforcement of the antitrust laws by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). Despite this broad language, the Supreme Court has noted that "the lower federal courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Assoc. Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 534 (1983) (internal quotations and citation omitted) ("AGC").

---

[2] The District Court had federal subject matter jurisdiction over this case under 28 U.S.C. § 1337(a) and 15 U.S.C. § 4. The District Court granted the defendants' summary judgment motion. The District Court's decision was final as to all parties and claims. Therefore, we have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

Accordingly, the Supreme Court has required courts, in order to determine if a plaintiff can bring an antitrust claim, to "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id.* at 535.

A "showing of antitrust injury is necessary, but not always sufficient, to establish standing . . ., because a party may have suffered antitrust injury but may not be a proper plaintiff . . . for other reasons." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110, n.5 (1986). In order to show an antitrust injury the "plaintiff must prove that it suffered an injury that (1) is of the type the antitrust laws were intended to prevent and (2) flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 349 (1990) (internal quotations and citation omitted).

Considering this issue *de novo*, we consider whether the injury that Atlantic Exposition alleges is of the type that antitrust laws were intended to prevent. *Id.* Atlantic Exposition claims that it satisfies this requirement because Atlantic Exposition lost profits "from having to pay the higher rates of the Carpenters compared to the lower rates of [Atlantic Exposition's preferred union]." (Atlantic Exposition Reply Br. at 8.) The purpose of antitrust laws is to protect competition, not competitors. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S.Ct. 2705, 2724 (2007). Thus, Atlantic Exposition's reference to its lost profits alone does not show antitrust injury. We must consider competition from "the viewpoint of the consumer," looking at "the prices, quantity or quality of goods or services" in the relevant geographic market

for a product to determine if there has been an injury to competition. *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 641 (3d Cir. 1996) (internal quotations and citation omitted). If Atlantic Exposition could show that the Convention Center was in its own geographic market and able to raise prices or decrease the quality of the services it provided after entering into the 1996 Agreement, this would show that the injury was "of the type the antitrust laws were intended to prevent." *Atlantic Richfield Co.*, 495 U.S. at 349.

Accordingly, we first consider whether the Convention Center was its own geographic market. "The relevant geographic market is the area in which a potential buyer may rationally look for the goods or services he or she seeks; boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand." *Pa. Dental Ass'n v. Med. Svc. Ass'n of Pa.*, 745 F.2d 248, 260 (3d Cir. 1984) (internal citations omitted). "Interchangeability implies that one product is roughly equivalent to another for the use to which it is put." *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 437 (3d Cir. 1997) (internal quotations and citation omitted).

The District Court considered the geographic market from the perspective of the show producers. Atlantic Exposition argues that this was error, that the District Court should have considered the geographic market from the perspective of local show contractors, once the show producers had selected the Convention Center. If the District Court was correct to consider the geographic market from the perspective of the show producers, the finding that the Convention

Center cannot be its own market is certainly correct. Atlantic Exposition does not dispute that show producers have roughly equivalent alternatives to the Convention Center in Philadelphia, Atlantic City and elsewhere on the East Coast.

The Department of Justice's merger guidelines provide guidance on whether it is appropriate to define a market from the perspective of the show contractors. In the merger guidelines, the Department of Justice defines a geographic market as "a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and nontransitory' increase in price, holding constant the terms of sale for all products produced elsewhere." U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, § 1.21 (1997). Applying this definition, as long as the show producers have options other than the Convention Center, SMG will be unable to profitably impose a price increase and, therefore, cannot be its own geographic market. In addition, the Second Circuit has held that a "geographic market encompasses the geographic area . . . in which the antitrust defendants face competition." *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 228 (2d Cir. 2006) (internal quotations and citation omitted). It is undisputed that the Convention Center competes to attract trade shows with other convention centers. This view also supports the District Court's determination that the Convention Center was not its own geographic market.

Accordingly, we affirm the District Court's determination that the Convention Center is not its own geographic market. Therefore, Atlantic Exposition will be unable to show an antitrust injury and, accordingly, does not have standing to pursue this claim.

III. Conclusion

For the reasons stated above and in the District Court's written opinion, we will affirm the decision of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4848

[Filed: January 28, 2008]

ATLANTIC EXPOSITION SERVICES INC.; HOWARD CASPER,	)
v.	)
SMG, formerly known as SPECTACOR MANAGEMENT GROUP; ROBERT MCCLINTOCK; SOUTH JERSEY REGIONAL COUNCIL OF CARPENTERS, LOCAL 623.	)
Howard Casper, Appellant	)

On Appeal from the United States District Court
for the District of New Jersey
(District Court No: 00-cv-3465)
District Judge: Joseph E. Irenas

Submitted Under Third Circuit L.A.R. 34.1(a)
November 29, 2007

Before: BARRY, FUENTES, Circuit Judges, and DIAMOND, District Judge.

JUDGMENT

This cause came to be heard on the record from United States District Court for the District of New Jersey. It was submitted pursuant to Third Circuit L.A.R. 34.1(a) on November 29, 2007.

On consideration whereof, it is hereby ORDERED and ADJUDGED by this Court that the judgment of the said District Court entered October 31, 2006, is hereby affirmed and costs should be taxed against the appellant.

All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

Dated: January 28, 2008

---

* Honorable Paul S. Diamond, District Judge for the United States District Court of the Eastern District of Pennsylvania, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 00-3465 (JEI)

[Filed October 31, 2006]

HOWARD CASPER,
Plaintiff,

v.

SMG,(formerly known as Spectator Management Group); ROBERT McCLINTOCK; and SOUTH JERSEY REGIONAL COUNCIL OF CARPENTERS, LOCAL 623,
Defendants.

OPINION

IRENAS, Senior District Judge:

This antitrust case arises out of a labor dispute involving trade show and convention work at the Atlantic City Convention Center. Presently before the Court are the Motions for Summary Judgment filed by Defendants SMG, Robert McClintock, and South Jersey Regional Council of Carpenters, Local 623

(collectively "Defendants"). For the reasons that follow, the Court will grant Defendants' motions.

I.

Plaintiff's only remaining claim[1] pursuant to § 1 of the Sherman Act,[2] centers around an agreement between Defendants Spectator Management Group ("SMG")[3] and South Jersey Regional Council of Carpenters, Local 623 ("Carpenters"), which was entered into on April 15, 1996 ("April 15th

---

[1] In addition to the Sherman Act claim, the Complaint alleges state law claims of tortious interference with contracts, civil conspiracy, and violations of the New Jersey Antitrust Act. In 2001, District Court Judge Orlofsky granted Defendants' Motions to Dismiss all of the state law claims, determining that those claims were preempted by the National Labor Relations Act. At that time, the Court also stayed the case with respect to the Sherman Act claim because the parties were simultaneously involved in litigation before the National Labor Relations Board. The NLRB litigation of the labor issues implicated by this case, and subsequent appeal of the Board's decision to the Third Circuit (see discussion *infra*), accounts for the long lapse of time between the Motions to Dismiss and the present Motions.

[2] 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

[3] Defendant Robert McClintock was, at all relevant times, SMG's General Manager at the Atlantic City Convention Center. The parties refer to SMG and McClintock together as "SMG," as all parties apparently agree that there is no practical difference between these defendants with respect to the antitrust issues.

Agreement"). SMG, the private management company for the Atlantic City Convention Center ("ACCC"), agreed that if it chose to subcontract out certain trade show work, namely the construction of exhibit booths and displays ("trade show work"), the work would only be subcontracted to companies ("Show Contractors") having collective bargaining agreements with the Carpenters.

Atlantic Exposition Services ("AES") is one of many Show Contractors that hire laborers to perform trade show work at the ACCC. AES refused to sign a collective bargaining agreement with the Carpenters, preferring instead to use the Painters Union. It challenged the April 15th Agreement on two fronts. First, in 1998, AES filed a complaint with the National Labor Relations Board asserting that the agreement violated § 8(e) of the National Labor Relations Act ("NLRA"). Later, in 2000, AES filed the instant Complaint; thereafter assigning its interest in this litigation to Howard Casper ("Plaintiff"), a former principal of AES.

AES prevailed before the NLRB[4] and the decision was affirmed by the Third Circuit. Specifically, the Third Circuit held that the April 15th Agreement violated NLRA § 8(e) and the work covered by the agreement was not protected by the "construction

---

[4] *See South Jersey Regional Council of Carpenters, Local 623 et al.*, 335 NLRB 586 (2001).

industry proviso" to § 8(e).[5] *Spectator Management Group v. National Labor Relations Board*, 320 F.3d 385 (3d Cir. 2003). Accordingly, SMG stopped enforcing the April 15th Agreement and has since allowed AES to use the labor of its choice. Plaintiff identifies the "liability period" as October 1, 1998 (when SMG required AES to use Carpenters labor in the ACCC) to February 13, 2003 (when the Third Circuit affirmed the NLRB's decision).

The following facts are relevant to the present motions. The ACCC is among the 30 largest convention centers in the country. Show Producers choose among the convention centers and other venues to house their trade show or exhibition. Once a Show Producer selects the ACCC, it signs a license agreement with SMG which governs the use of the space. Then the Show Producer must obtain workers to construct and dismantle the exhibit booths and other displays for the show. The two sources of labor in this case are SMG itself and Show Contractors.

Before the April 15th Agreement, SMG directly employed the workers who did all the trade show work in the ACCC; no trade show work was subcontracted out to Show Contractors. Pursuant to a 1983 collective bargaining agreement, SMG only employed workers

---

[5] *See* 29 U.S.C. § 158(e) ("[N]othing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work.").

represented by the Carpenters.[6] Thus, all Show Producers using the ACCC were required to go directly to SMG for the trade show labor they required and all the labor supplied by SMG was Carpenters labor.[7] SMG made a profit by selling the labor to Show Producers at a marked-up price. However, SMG's obligations under the 1983 Agreement were quite

---

[6] The 1983 Agreement was signed by the Atlantic City Convention Center Authority (the "Authority"), which operated the ACCC at that time. In 1995, the Authority engaged SMG to manage the facility. While the record is not clear as to whether SMG was ever legally bound to the obligations in the 1983 Agreement or when that agreement expired, the parties agree, and the NLRB found, that SMG acted as if it were bound by the 1983 Agreement until the April 15th Agreement was made. *See South Jersey Regional Council of Carpenters, Local 623 et al.*, 335 NLRB at 587 ("SMG continued to honor the terms of ACCCA's collective bargaining agreement until SMG negotiated a new agreement with the Carpenters in 1996."). Defendants assert that the issue of what agreement, if any, was in force between SMG and the Carpenters immediately before the April 15th Agreement is only relevant to whether the non-statutory labor exception to the antitrust laws, *see Consolidated Express, Inc. v. N.Y. Shipping Assn.*, 602 F.2d 494 (1979), applies in this case and is not relevant to antitrust injury or Plaintiff's prima facie case with respect to the tying and refusal to deal claims. Defendants state that because disputed issues of fact exist with regard to the non-statutory labor exception, they have not raised the defense in their motions for summary judgment.

[7] Plaintiff does not contend that this arrangement violated either labor or antitrust laws.

onerous[8] and, in 1995, SMG began planning and for what ultimately resulted in the April 15th Agreement. SMG's main objective was to lower its labor costs (thereby lowering the price charged to Show Producers) with the hope of attracting more Show Producers to the ACCC.

The April 15th Agreement allowed SMG to "subcontract" out trade show work to Show Contractors. Specifically, the April 15th Agreement (drafted by Defendant McClintock) stated:

> Finally, Trade employees who work on a part-time basis or who perform contracted work for SMG (e.g., "show" labor) will work under a Separate Agreement which will be negotiated as soon as practicable.[9] It is understood and agreed that the Separate Agreement will contain a provision stipulating that in the event that SMG subcontracts the covered work, the work will be subcontracted to a firm which will be [sic] negotiate an agreement with the (Trade) Local having jurisdiction over that work with SMG [i.e. the Carpenters]. The said sub-contractor will be free to negotiate the terms and conditions of the said agreement and

---

[8] For example, many trade shows are held over weekends and the 1983 Agreement required double-time pay for Saturday work.

[9] A "Separate Agreement" was never executed but the parties do not dispute that SMG and the Carpenters conducted business with the intent to be bound by the terms of the April 15th Agreement.

> will not be bound by SMG's agreement(s) with the applicable local union.

(Pls. App. K at JA387)

Thus, the April 15th Agreement, at least on its face, contemplated that SMG, rather than providing labor directly to Show Producers itself, as it had in the past, would now subcontract that work to Show Contractors. However, the parties agree that in practice, the April 15th Agreement was interpreted to allow Show Producers to hire Show Contractors directly, without any involvement by SMG.[10] Thus, SMG was never a "subcontractor" in the traditional sense, despite the parties' description of the April 15th Agreement as a "subcontracting agreement."

The April 15th Agreement also limited the pool of "subcontractors" eligible to work in the ACCC to those who had signed a collective bargaining agreement with the Carpenters, although the Agreement did not specify what the terms of that collective bargaining agreement would be. The Carpenters' collective bargaining agreement (to which SMG was not a party) required Show Contractors to use Carpenters labor for *all* work within the Carpenters' seven county

---

[10] SMG's standard license agreement which Show Producers signed effectively bound the Show Producers to SMG's agreement with the Carpenters. The license agreement required Show Producers "not to violate any labor agreement entered into by ACCCA [or] SMG . . . and comply and/or cause [Show Producers'] employees and independent contractors to be in compliance with all of the provisions of such labor agreements." (Pls. App. A at JA483)

jurisdiction in Southern New Jersey (the "Seven County Agreement"). If a Show Contractor refused to sign the Seven-County Agreement, it could not work in the ACCC under the more favorable work rules set by the April 15th Agreement but it could still work in the ACCC under the terms set by the 1983 Agreement.

Plaintiff asserts that the Defendants specifically negotiated and intended the combined results of the April 15th Agreement and the Seven County Agreement. Indeed, Plaintiff points to evidence that SMG, as opposed to the Carpenters, first proposed extending the Carpernters' CBA to cover all work within the seven counties of Southern New Jersey. The work rules and conditions under the 1983 Agreement between the Carpenters and SMG's predecessor were more burdensome to SMG (and more beneficial to the Carpenters) than the terms of the April 15th Agreement. According to Plaintiff, SMG proposed the Seven County Agreement as a means to compensate for the less favorable work rules: the Carpenters would give up certain benefits, such as double-time pay for Saturday work, in exchange for more work in the smaller venues within the seven county region. Those smaller venues were mainly hotels and casinos.

Most Show Contractors signed the seven county collective bargaining agreement with the Carpenters. AES did not sign the agreement because it did not want to use Carpenters labor in the hotels and casinos. AES preferred less expensive labor, such as the Painters Union or the Show Hands Union.

The Third Circuit has ruled that Defendants violated the labor laws. The only question remaining

is whether they have also violated the antitrust laws. Defendants move for summary judgment asserting, among other things, that Plaintiff lacks antitrust standing. For the following reasons, Defendants' motions will be granted.

II.

"[S]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). In deciding a motion for summary judgment, the Court must construe the facts and inferences in a light most favorable to the non-moving party. *Pollock v. Am. Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986). The role of the court is not "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Despite the "factually intensive" nature of antitrust cases, "the standard of Fed. R. Civ. P. 56 remains the same." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 481 (3d Cir. 1992) (en banc), *cert. denied*, 506 U.S. 868 (1992); *see also Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 468 (1992).

III.

Plaintiff's theory of the case is that SMG and the Carpenters drafted the April 15th Agreement with the

intention that the Carpenters would require all Show Contractors to sign a collective bargaining agreement encompassing the seven counties of Southern New Jersey. In other words, Plaintiff asserts that Defendants conspired[11] to achieve a scheme whereby the Carpenters gained more hotel and casino work in Southern New Jersey and SMG gained a competitive advantage (through lower labor costs) over the other Southern New Jersey venues which house smaller trade shows.[12]

The conspiracy's objectives were allegedly achieved through a tying arrangement and a concerted refusal to deal in violation of the Sherman Act. With respect to the tying claim, Plaintiff reasons that Defendants created an illegal tie between large trade show work at the ACCC under the more favorable work conditions set by the April 15th Agreement (the tying product) and labor in the hotel and casino venues within the seven counties of Southern New Jersey (the tied product). With respect to the refusal to deal claim,

---

[11] While there are issues of disputed fact as to whether the Carpenters and SMG actually conspired with each other, the record supports the reasonable inference that a conspiracy existed. Accordingly, for summary judgment purposes only, the Court resolves the factual dispute in Plaintiff's favor and proceeds on the assumption that Defendants conspired with one another.

[12] The record establishes that the ACCC is not a competitor of the hotels and casinos in the market for large trade shows (generally defined by the parties as shows requiring more than 10,000 square feet of space). However, the ACCC does compete with the hotels and casinos for smaller trade shows. For smaller trade shows, only a portion of the ACCC is used.

Plaintiff reasons that Defendants effectively closed AES out of the ACCC entirely because AES did not use Carpenters labor. Because the Court concludes that Plaintiff has failed to establish that AES suffered an antitrust injury under either theory, Plaintiff lacks standing and summary judgment for Defendants is warranted.

A.

"Tying exists where a seller conditions the sale of one good (the tying product) on the buyer also purchasing another, separate good (the tied product)." *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 510 (3d Cir. 1998) (citing *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 475 (3d Cir. 1992)). Not all tying arrangements violate the Sherman Act. *Id.* at 511 n.6. The Sherman Act only forbids tying arrangements (and other contracts and conspiracies) that restrain trade. *Allen-Myland, Inc. v. Int'l Business Machines Corp.*, 33 F.3d 194, 200 (3d Cir. 1994). Thus, when "the seller can exploit its market power in the tying market to force buyers to purchase the tied product which they otherwise would not, thereby restraining competition in the tied market," an illegal tie has occurred. *Brokerage Concepts,* 140 F.3d at 510.

Before reaching the merits of Plaintiff's tying claim, the Court must first determine whether AES suffered an antitrust injury, a necessary prerequisite for Plaintiff's standing to bring suit. *2660 Woodley Road Joint Venture v. ITT Sheraton Corp.*, 369 F.3d 732, 740-41 (3d Cir. 2004); *Bocobo v. Radiology Consultants*

of S. Jersey, 305 F. Supp. 2d 422, 425 (D.N.J. 2004).[13] "Antitrust injury" is an "'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *2660 Woodley Road*, 369 F.3d at 738 (quoting *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981)). "It is well-established that an antitrust injury reflects an activity's anti-competitive effect on the competitive market." *Eichorn v. AT&T Corp.*, 248 F.3d 131, 140 (3d Cir. 2001), *cert. denied*, 534 U.S. 1014.

Illegal ties, because of their restraint on competition, principally cause two types of harm. First, the tie injures buyers of the tied product by foreclosing consumer choice. *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 1551, 1558 n.19 (1984) (quoting *Fortner Enterprises v. U.S. Steel Corp.*, 394 U.S. 495, 512-14 (1969) (dissent by Justice White)). Under competitive conditions, consumers can avoid the tie and purchase the preferred product (the tying product) elsewhere. *Town Sound*, 959 F.2d at 475 n.4. However, where competition is restrained, consumers are "forced" to buy a product "that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms" because the seller of the tying product has exploited its economic power in the tying market. *Jefferson Parish*, 466 U.S. at 158.

---

[13] "[A]ntitrust injury is a necessary but insufficient condition of antitrust standing. . . . the district court should first address the issue of whether the plaintiff suffered an antitrust injury. If antitrust injury is not found, further inquiry is unnecessary." *City of Pittsburgh v. West Penn Power Comp.*, 147 F.3d 256, 265 (3d Cir. 1998).

Second, the tie injures competitors in the tied market. "[A] monopolist in the tying product market may use [its] leverage to garner sales in a second market, thereby foreclosing competitors and monopolizing the formerly competitive tied market too;" or at least, raising substantial "barriers to entry to the tied market." *Town Sound*, 959 F.2d at 476; *see also Fortner*, 394 U.S. at 513. "[Tying arrangements] deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or lower price but because of his power or leverage in another market." *Northern Pacific Railway v. United States*, 356 U.S. 1, 6 (1958).

Thus, in order to determine whether Plaintiff has standing to assert the tying claim, the Court must examine whether AES suffered the type of harm that results from an illegal tying arrangement. Moreover, that issue necessarily requires an inquiry into the relevant markets and the parties' roles within those markets. *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*, 118 F.3d 178, 181 (3d Cir. 1997); *see also Allen-Myland*, 33 F.3d at 200-01 ("The first inquiry in any § 1 tying case is whether the defendant has sufficient market power over the tying product, which requires a finding that two separate markets exist and a determination of precisely what the tying and tied product markets are."); *In re Mercedes-Benz Antitrust Litig.*, 157 F. Supp. 2d 355, 363 (D.N.J. ("Defining the relevant market may be relevant to . . . whether the plaintiff at bar has suffered the requisite antitrust injury. In a tying or monopolization case, determining the defendant's power in the market may be crucial in deciding whether the activity complained

of actually would alter the competitive forces sufficiently to constitute a restraint of trade.").

Plaintiff explains that in this case, "[t]he defined relevant market for the tying product of show labor services at the Atlantic City Convention Center was fettered unreasonably due to the monopoly that SMG gave to and enforced for the Carpenters. The Carpenter Union was the sole seller in the tying market, and the Show Contractors were the buyers. . . . Show Contractors had no choice about which union or labor supply they could use in the Atlantic City Convention Center." (Pl. Br. at 32) Thus, Plaintiff asserts that AES, as a consumer of trade show labor in the ACCC (the tying product)[14] was injured by the Defendants' conspiracy which allegedly reduced competition among labor sources in the hotels and casinos (the tied market), thereby foreclosing AES's choice of labor sources in the tied market.

Additionally, Plaintiff asserts that AES suffered antitrust injury as a competitor of the Carpenters. Plaintiff explains that AES competed with the Carpenters for work in the hotels and casinos and that the tying arrangement reduced competition in the hotel and casino market, as evidenced by the fact that most of the other Show Contractors signed the Seven County Agreement. According to Plaintiff, every trade

---

[14] Plaintiff identifies the tying product very specifically: "Carpenter labor at the Atlantic City Convention [sic] at the same price, and with the same work rules that [AES's] competitors who signed the Carpenter Union's [Seven County Agreement] had." (Pl. Br. at 31)

show AES worked was one less chance for the Carpenters to work.

Both of Plaintiff's theories, however, are flawed because they employ an erroneous definition of the relevant market for the tying product. Nothing in the record supports Plaintiff's assertion that the ACCC is a market of its own.[15] Indeed, the record directly undermines such a limited definition of the relevant market. Plaintiff testified at his deposition that Show Producers looking for a venue to house their large trade show could go to venues in Philadelphia, Baltimore, New York, Boston, and possibly around the country. (Casper Dep. at 21-23) Likewise, Defendant McClintock testified that SMG competes nationally for large trade shows. (McClintock Dep. 153, 208-09) At a minimum, AES's owner and president, Patrick Perrino, stated in his affidavit that Philadelphia's convention center is comparable to the ACCC. (Perrino Aff. at 3)[16]

---

[15] Plaintiff's reasoning on this point is circular. Plaintiff states, "The geographic market here can be defined by both where the Carpenters were the imposed choice, and where SMG separately wielded its power. Since the Carpenters Union had a monopoly in the ACCC, it is a fitting market." (Pls' Supp. Br. at 14 n.19) The geographic market, however, is not defined by the alleged wrongful actions of the Defendants. "The geographic market is not comprised of the region in which the seller attempts to sell its product, but rather is comprised of the area where his customers would look to buy such a product." *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 726 (3d Cir. 1991).

[16] These facts distinguish this case from *MCM Partners, Inc. V. Andrews-Bartlett & Assoc., Inc.*, 62 F.3d 967 (7th Cir. 1995), upon

The undisputed record demonstrates that the ACCC is only one of several large trade show venues. Moreover, neither SMG or the Carpenters have control over what, if any, restrictions or conditions other comparable venues placed on labor sources used in their venue. Plaintiff does not allege, and the record does not suggest otherwise. Thus, even if, as Plaintiff asserts, AES is a "buyer" (i.e. consumer) of labor, there is no evidence in the record that AES could not go to the Philadelphia convention center to buy the labor of its choice and avoid the tie between the ACCC and use of Carpenters labor in the hotels and casinos.

Alternatively, assuming without deciding that AES is properly characterized as a competitor of the Carpenters, it has suffered no injury in the tied product market. It has not been forced out of the market for trade show work in the hotels and casinos. Indeed, by using the less expensive Painters Union labor while many other Show Contractors have agreed to use Carpenters labor, AES may have become more

---

which Plaintiff relies. In *MCM Partners*, the Seventh Circuit merely held that a complaint alleging one large trade show venue as the relevant market should not be dismissed on a Rule 12(b)(6) motion. *Id.* at 975. The district court dismissed the Sherman Act claim, holding that the alleged relevant market was too narrowly defined. The Seventh Circuit reversed, but it held, "we need not definitively decide [the relevant market] at this stage" because "it is not inconceivable that MCM could prove a set of facts supporting the relevant market definition alleged in its complaint." *Id.* at 976-77. Here, of course, Defendants have moved for summary judgment and this Court holds that Plaintiff has not proved a set of facts supporting his relevant market definition.

competitive relative to its competitors in the alleged tied product market.

Once the relevant market is determined to encompass more than just the ACCC,[17] it is clear that Plaintiff has failed to put forth any evidence that Defendants, individually or together, possess the type of market power in the tying product market that would enable it to exert the requisite "force" in the tied product market.[18] By definition, the anti-competitive effect of an illegal tie results from a "seller [exploiting] its market power in the tying market to force buyers to purchase the tied product which they otherwise would not." *Brokerage Concepts,* 140 F.3d at 510. Without proof of sufficient market power in the tying product market, there can be no anti-competitive effect and therefore no antitrust injury.

Employing the proper tying market definition, this case may still involve a tie, but merely a tie of the type

---

[17] Issues of material fact may exist as to the precise contours of the relevant market; for example, whether the tying product market is nationwide, or limited to the Northeast, or perhaps even the Mid-Atlantic States. However, such issues do not preclude summary judgment in this case because the undisputed record sufficiently establishes that the ACCC alone cannot be the relevant market as a matter of law.

[18] *See Jefferson Parish*, 466 U.S. at 13-14 ("we have condemned tying arrangements when the seller has some special ability--usually called 'market power'-- to force a purchaser to do something that he would not do in a competitive market. When 'forcing' occurs, our cases have found the tying arrangement to be unlawful.") (internal citations omitted).

that is not the concern of antitrust laws. As the Supreme Court explained in *Jefferson Parish*, "if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition if its competitors were ready and able to sell flour by itself." 466 U.S. at 12. Here, Defendants tied large trade show work *in one particular venue* to the use of Carpenters labor in the hotels and casinos. But nothing in the record indicates that AES and other Show Contractors could not go to Philadelphia or Baltimore, for example, for large trade show work and continue to use non-Carpenter labor in the hotels and casinos. In other words, AES could obtain large trade show work (the desirable tying product) without having to use Carpenters in the hotels and casinos (the undesirable or less desirable tied product). Therefore it suffered no antitrust injury.[19]

---

[19] It is worth noting that during oral argument on the present motions, the parties were granted leave to file supplemental briefing on the issue of antitrust injury. Plaintiff's supplemental brief principally relies upon five cases: *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); *Connell Construction Co. v. Plumbers and Steamfitters Local Union*, 421 U.S. 616 (1975); *Consolidated Express, Inc. v. New York Shipping Ass'n*, 620 F.2d 494 (3d Cir. 1978); *Larry Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council*, 609 F.2d 1368 (3d Cir. 1979) (*Muko I*); and *Larry Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council*, 670 F.2d 421 (3d Cir. 1982). All of these cases pre-date *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 1551 (1984), as well as the many Third Circuit cases that have since applied and refined the standing analysis.

B.

The record also cannot support a finding of antitrust injury under Plaintiff's refusal to deal theory. Plaintiff's theory is that as a result of the Carpenters' and SMG's concerted refusal to deal with AES, AES was forced out of the relevant market, which AES claims is the ACCC. Plaintiff reasons that the Defendants' concerted actions disadvantaged AES because if AES wanted to work on ACCC shows, it had to either sign the Seven County Agreement or work under onerous provisions of the 1983 Agreement, which was allegedly not economically feasible. Essentially, Plaintiff complains that SMG refused to deal with AES on the terms AES preferred, namely working under the more favorable work rules without signing the Seven County Agreement.

The injury complained of, however, is an injury to AES, not to competition. "Injury, though causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anticompetitive aspect of the practice under scrutiny." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990). The anti-competitive aspect in refusal to deal cases results from an antitrust defendant's refusal to deal with the plaintiff while simultaneously dealing with the plaintiff's competitors, thereby unreasonably altering the competitive landscape among competitors in the plaintiff's business. *See, e.g., Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 130 (1998) ("buyer's decision to buy from one seller rather than another;" "the decision to discriminate in favor of one supplier over another"); *Northwest Wholesale Stationers, Inc. v. Pacific*

Stationery and Printing Co., 472 U.S. 284 (1985) (purchasing cooperative's alleged arbitrary expulsion of one of its members was a "refusal to deal with [member] on equal footing"); *Klor's Inc. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (retail store agreed with manufacturers and distributors not to sell merchandise to a particular competitor of the retail store's while continuing to sell to other retailers); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941) (clothing designers agreed with manufacturers and suppliers not to sell clothes to retail stores which sold pirated designer clothes while continuing to sell clothes to other retailers).

In this case, however, all Show Contractors are presented with the same set of conditions for working in the ACCC. All Show Contractors were put to the same choice AES faced: either sign the Seven County Agreement or work under the conditions set by the 1983 Agreement. Thus, there was no uneven playing field and no harm to competition. Therefore, AES suffered no antitrust injury and Plaintiff lacks standing to assert the refusal to deal claim.[20]

---

[20] Because the Court holds that Plaintiff lacks standing to assert the Sherman Act claim, the Court does not reach the merits of the refusal to deal theory. However, Plaintiff's theory would also likely fail on the merits under either a per se or rule of reason approach because both require proof of the relevant market. *See Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 74 (3d Cir. 2000) ("Per se boycott cases usually contain three elements: denial of something a competitor needs to compete effectively, defendants with a dominant position in the relevant market, and the absence of any plausible contention that the challenged behavior would enhance overall efficiency and make

IV.

For the foregoing reasons, the Court holds that Plaintiff lacks antitrust standing to assert his Sherman Act claim because the undisputed record cannot support a finding of antitrust injury. Accordingly, Defendants' Motions for Summary Judgment will be granted in their entirety. The Court will issue an appropriate order.

October 31, 2006

s/ Joseph E. Irenas
JOSEPH E. IRENAS, S.U.S.D.J.

---

markets more competitive."); *Eichorn v. AT&T Corp*, 248 F.3d 131, 138 (3d Cir. 2001) ("Under [the rule of reason] test, plaintiffs have the burden of establishing that, under all the circumstances, the challenged acts are unreasonably restrictive of competitive conditions in the relevant market."). As explained *supra* at Section III. A., Plaintiff has not put forth sufficient evidence of Defendants' dominance in the relevant geographic market, which is properly defined as larger than the ACCC.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 00-3465 (JEI)

[Filed October 31, 2006]

HOWARD CASPER, Plaintiff,	)
v.	)
SMG,(formerly known as Spectator Management Group); ROBERT McCLINTOCK; and SOUTH JERSEY REGIONAL COUNCIL OF CARPENTERS, LOCAL 623, Defendants.	)

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT
(Docket Nos. 64 & 65)

IRENAS, Senior District Judge:

This matter having come before the Court upon the Motions for Summary Judgment by Defendants SMG, Robert McClintock, and South Jersey Regional Council of Carpenters, Local 623, (collectively "Defendants") the Court having reviewed the submissions of the parties and having held oral argument, for the reasons set forth in an Opinion issued by this Court, which findings of facts and conclusions of law are incorporated herein by reference, and for good cause appearing,

IT IS on this **31st** day of **October, 2006, ORDERED THAT:**

1. Defendants' Motions for Summary Judgment are hereby **GRANTED**.

2. The Clerk of Court is hereby directed to close this file.

s/ Joseph E. Irenas

Joseph E. Irenas, S.U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 01-3644, 01-3694, 01-4036

[Filed February 13, 2003]

SPECTACOR MANAGEMENT GROUP,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

ATLANTIC EXPOSITION SERVICES, INC.,
Intervenor.

SOUTH JERSEY REGIONAL COUNCIL OF CARPENTERS, LOCAL 623 AFFILIATED WITH THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

ATLANTIC EXPOSITION SERVICES, INC.,
Intervenor.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SPECTACOR MANAGEMENT GROUP;
SOUTH JERSEY REGIONAL COUNCIL OF
CARPENTERS, LOCAL 623, AFFILIATED WITH
THE UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO,
Respondents,

ATLANTIC EXPOSITION SERVICES, INC.,
Intervener.

Before: SLOVITER, FUENTES, Circuit Judges, and DEBEVOISE,* District Judge.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

At issue in this case is whether it was reasonable for the National Labor Relations Board ("NLRB" or "Board") to find that § 8(e) of the National Labor

---

* The Hon. Dickinson R. Debevoise, Senior Judge, United States District Court for the District of New Jersey, sitting by designation.

Relations Act ("Act"), 29 U.S.C. § 158(e), was violated by (1) an agreement between the Union and the company managing a convention center that provides that the installation, assembly and dismantling of temporary tradeshow exhibits would be subcontracted only to companies that hired Union members and (2) to find that such work was not protected by the construction industry proviso of § 8(e). All parties agree that the latter issue is one of first impression.

I.

INTRODUCTION

Spectacor Management Group ("SMG") and the South Jersey Regional Council of Carpenters, Local 623 ("Union") (collectively "Petitioners") petition this court for review of the order and decision of the NLRB finding that an agreement entered into and enforced by Petitioners violated § 8(e) of the National Labor Relations Act ("Act"). The agreement, which precluded SMG from subcontracting trade show work to employers who did not have collective bargaining agreements with the Union, was enforced against Atlantic Exposition Services, Inc. ("AES"), the original Charging Party and Intervener here.

The Administrative Law Judge ("ALJ") ruled against the Petitioners. On appeal, the Board approved the ALJ's finding that the agreement violated § 8(e). The Board agreed that the "agreement lacked a work preservation objective, that the work covered by the agreement was not performed on a construction site, and therefore that the agreement was not protected by the construction industry proviso." Decision & Order

at 1, 335 NLRB No. 49 (2001). As a result, the Board adopted the recommended order of the ALJ which, in relevant part, directed the parties to cease and desist from maintaining and enforcing their subcontracting agreement.

The Petitioners attack the Board's decision on both grounds. Primarily, Petitioners argue that trade show work at the Atlantic City Convention Center constitutes construction work at a construction site, thereby entitling their agreement to the protection of the construction industry proviso. Alternatively, Petitioners argue that the agreement was not illegal because it fell within the work preservation doctrine, in that it served the primary purpose of preserving the Union's work at the Convention Center rather than unlawfully sought to secondarily influence labor relations of other employers. The Union also argues that the agreement did not violate the Act as it failed to disrupt or change the way AES conducted business with SMG.

Congress has not spoken on whether a trade show floor constitutes a construction site for purposes of the construction industry proviso, and neither the Board nor any court has hitherto determined the issue. Given the deference that we owe the Board on issues within its purview, we will accept its determination.

II.

FACTS AND PROCEDURAL BACKGROUND

A.

Some background of the current dispute is necessary to appreciate the issue. Between 1983 and 1995, the Atlantic City Convention Center Authority ("ACCCA") operated and managed the Convention Center. The Union represented ACCCA employees who assembled and dismantled trade show exhibits. During this time, the collective bargaining agreements between ACCCA and the Union precluded ACCCA from subcontracting trade show work. In or before 1995, the New Jersey Sports and Exposition Authority became an owner of the Center and decided to manage it through SMG, a private management company.[1] When SMG's predecessors managed the Convention Center, they directly hired members of the Union for trade show work.

SMG honored the terms of ACCCA's collective bargaining agreement. Show exhibitors contracted with SMG to provide the labor to assemble and dismantle tradeshow exhibits. SMG, in turn, procured the appropriate labor force from the Union's hiring hall. In 1996, SMG sought to remove itself as the middleman between show exhibitors and laborers, leaving the direct employment of labor to

---

[1] SMG is a Pennsylvania joint venture which manages public assembly facilities, such as convention centers, on behalf of municipal partners.

subcontractors or tenants. Accordingly, it negotiated a new agreement with the Union that no longer prohibited subcontracting at the Convention Center. Instead, the Union and SMG agreed that trade show work traditionally performed through the Union's hiring hall could be subcontracted as long as Union workers continued as the sole providers of trade show labor under agreements reached between the subcontractors and the Union.

This agreement, incorporated in a letter dated April 15, 1996, stands at the center of the current dispute. It provides:

> Trade employees who work on a part-time basis or who perform contracted work for SMG (e.g. "show" labor) will work under a Separate Agreement which will be negotiated as soon as is practicable. It is understood and agreed that the Separate Agreement will contain a provision stipulating that in the event SMG subcontracts the covered work, the covered work will be subcontracted to a firm which will ... negotiate an agreement with the (Trade) Local having jurisdiction over that work with SMG. The said sub-contractor will be free to negotiate the terms and conditions of the said agreement and will not be bound by SMG's agreement(s) with the applicable local union.

Decision & Order at 3. No Separate Agreement as referred to above was negotiated but the parties proceeded to act as if the above paragraph was binding. If a subcontractor failed to reach its own agreement with the Union, it was required to obtain

labor through the previous method where SMG played middleman, using Union labor.

AES, unlike many, if not all, of the other subcontractors at the Convention Center, did not sign an agreement with the Union but chose to use its own employees, members of the Painters Union. In 1998, as an AES employee was installing a tradeshow exhibit at the Center, he was ordered to stop working by a Union foreman. Thereafter, the SMG General Manager demanded that AES either use Union laborers or leave the Convention Center altogether. This current litigation ensued.

B.

On October 13, 1998, AES filed charges against the Union and SMG for refusing to allow AES to use its own employees to do its tradeshow work at the Convention Center. The ALJ found that the Union and SMG had violated § 8(e) of the Act when they entered into and enforced the agreement that SMG would not subcontract work to employers who did not have collective-bargaining agreements with the Union. In so finding, the ALJ reasoned that the agreement did not have a valid work preservation purpose because it was "not limited to addressing the labor relations of SMG vis-a-vis its own employees, but instead seeks to regulate the labor policies of other, neutral employers by requiring them to have agreements with the Carpenters, an objective that is clearly secondary." Decision & Order at 4. The ALJ also rejected the Petitioners' defense that the work involved in trade shows was protected by the construction industry proviso to § 8(e). The ALJ held that SMG was not an

employer in the construction industry. He further concluded that the construction industry proviso to § 8(e) was not applicable because the work in question was not "associated with building a structure" and was not being performed at "'the site of the construction, alteration, painting, or repair of a building, structure or other work' as Section 8(e) requires." *Id.* at 9.

In a brief Decision and Order entered August 27, 2001, a unanimous three member panel of the Board affirmed the ALJ's finding that the "agreement lacked a work preservation objective, that the work covered by the agreement was not performed on a construction site, and therefore that the agreement was not protected by the construction industry proviso." Decision & Order at 1. The Board did not reach and did not decide the ALJ's conclusion that SMG was not an employer in the construction industry.

Shortly thereafter, SMG and the Union filed Petitions for Review in this court. The Board filed a Cross-Application for Enforcement. AES intervened in support of the Board. The United Brotherhood of Carpenters and Joiners and GES Exposition Services filed briefs as amici curiae.

III.

DISCUSSION

A. Jurisdiction and Standard of Review

We have jurisdiction to review final orders of the National Labor Relations Board pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. §§ 160(e) and (f). We

accept the Board's factual findings if they are supported by substantial evidence. We exercise plenary review over questions of law and the Board's application of legal precepts. *NLRB v. Attleboro Associates, Ltd.*, 176 F.3d 154, 160 (3d Cir. 1999). For the Board to prevail, "it need not show its construction is the best way to read the statute;" rather we must respect the Board's judgment as long as it is reasonable. *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409, 116 S.Ct. 1396, 134 L.Ed.2d 593 (1996) (emphasis in original).

B. Section 8(e) and the Work Preservation Doctrine

At oral argument, the Union conceded that its agreement with SMG would be illegal under § 8(e) were it not entitled to the protection of the construction industry proviso. Tr. of Oral Argument, Oct. 29, 2002, at 4. However, in their briefs the Petitioners press the argument that their agreement is not proscribed by § 8(e). In doing so, they invoke the work preservation doctrine.[2] Notwithstanding the

---

[2] The Union's argument that the Board erred as a matter of law in concluding that it violated § 8(e) because the agreement did not result in disruption or cessation of AES's existing business relationship with SMG or change the way AES had been doing business at the Center before the agreement, is satisfactorily answered by the Board's earlier decision that "[t]he cease-doing business element of Sec. 8(e) is satisfied by proof of prohibitions against forming business relationships in the first place as well as requirements that one cease business relationships already in existence." *Northeast Ohio Dist. Council of Carpenters (Alessio Construction)*, 310 NLRB 1023, 1025 n. 9 (1993).

Union's concession, it is important that we consider whether the Union/SMG agreement falls within the proscription of § 8(e) as that was the predicate for the decisions of both the Board and the ALJ.

Section 8(e), which was added to the Act by the 1959 Landrum-Griffin Act, provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.

29 U.S.C. § 158(e).

It is apparent that the literal language of the SMG/Union agreement comes clearly within the prohibition of § 8(e) of the Act. In *National Woodwork Mfrs. Ass'n v. NLRB,* 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967), the Supreme Court explained that § 8(e) was designed to invalidate so-called "hot cargo" clauses, or agreements between a union and an employer whereby the employer agrees not to deal with other employers with whom the union either has a labor dispute or who it deems to be unfair to organized labor. *Id.* at 634-37, 87 S.Ct. 1250. Looking to the legislative history of § 8(e), the Supreme Court

interpreted the section to invalidate only those contract clauses with secondary objectives, while those with a primary purpose, such as work preservation, remained lawful. *See id.* at 637-645, 87 S.Ct. 1250. If the purpose of the agreement is to benefit the employees of the bargaining unit, the agreement is primary and thus lawful, but if its aim is to pressure outside employers to concede to union objectives, the agreement is unlawfully secondary. *In re Bituminous Coal Wage Agreements,* 756 F.2d 284, 289 (3d Cir. 1985). As the Supreme Court stated in an oft-repeated sentence, "the touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." *National Woodwork,* 386 U.S. at 645, 87 S.Ct. 1250.

The Supreme Court further stated that a lawful work preservation agreement must pass two tests. First, the agreement must seek to preserve work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question, which is known as the "right of control" test. *NLRB v. Int'l Longshoremen's Ass'n,* 447 U.S. 490, 504, 100 S.Ct. 2305, 65 L.Ed.2d 289 (1980) (*"ILA I"*). The rationale is that if the contracting employer does not have the power to assign the work, it is reasonable to infer that the agreement has the secondary objective to influence the person or entity that has such power. *Id.* at 504-05, 100 S.Ct. 2305.

In the case before us, the ALJ, in reasoning adopted by the Board, found the agreement to be unlawfully secondary in nature because it "was not intended to preserve work but was intended to satisfy the union's

objectives elsewhere." Decision & Order at 4. The ALJ found that the SMG/Union agreement violated *National Woodwork*'s touchstone as it was not limited to SMG's labor relations vis-a-vis its own employees but sought to regulate the labor policies of other neutral employers (subcontractors, such as AES) by requiring them to contract with the Union, an unlawful secondary objective. SMG had removed itself from the role of employer when it began subcontracting, and accordingly the Union workers were no longer SMG employees. Adding support to the ALJ's finding that the agreement sought to regulate other employers' labor policies was the fact that the Union rejected AES' offer to contract with it for work done at the Convention Center but insisted that AES also enter an agreement that covered seven counties in southern New Jersey.[3]

Petitioners argue that because SMG manages the Convention Center, it exercises control over the work conducted there. However, SMG's agreement with the Union, which removed SMG from the role of employer by allowing it to subcontract, eliminated SMG's ability to "give the employees the work in question." *ILA I*, 447 U.S. at 504, 100 S.Ct. 2305. The agreement forced the subcontractors to negotiate their own agreements with the Union, thereby giving these subcontractors the power to assign employees the work in question,

---

[3] Those subcontractors who signed agreements with the Union received significant benefits, such as the elimination of double time on weekends, elimination of nonworking personnel, and revised jurisdictional lines allowing the subcontractors to use cheaper employees represented by another union on certain jobs.

namely installing, assembling and dismantling trade show exhibits. It is therefore apparent that the SMG/Union agreement did not satisfy the work preservation doctrine's touchstone as it was not limited to labor relations of SMG vis-a-vis its own employees. Instead, the SMG/Union agreement plainly affects the labor relations of employers other than SMG.

In its oral argument, SMG argued that even though it had subcontracted trade show work, it retained the right directly to employ Union members when the show promoter opted to hire a subcontractor who did not have a contract with the Union (a nonsignatory employer). SMG stated that because it could hire and supervise Union members and provide them to the contractor, it should be treated as the direct employer. However, SMG was unable to provide the court with any estimate as to how often this situation arose and it produced no records in that connection. Tr. of Oral Argument, Oct. 29, 2002, at 17. Assuming the existence of some such situations, we fail to see why it would undercut the ALJ's determination that the SMG/Union agreement falls precisely within the prohibition of § 8(e) as that agreement requires neutral employers to contract with the Union.

Reiterating its argument based on the work preservation doctrine, the Union emphasizes that it has provided trade show exhibition work at the Convention Center for decades, and its agreement with SMG merely seeks to preserve the Union's historical work at that venue. This argument fails for two reasons. First, it completely avoids the "touchstone" of the work preservation doctrine because it does not

even attempt to challenge the ALJ's critical finding that the agreement was not limited to labor relations of SMG vis-a-vis SMG's own employees. Second, the Union fails to justify its efforts to use the agreement covering the Center to expand its reach into seven other counties.

In contrast to the Union, SMG glides quickly over the work preservation argument and largely relies on the Union's brief on this issue. Nonetheless, SMG distances itself from the Union by arguing that if a violation of § 8(e) did occur, it was limited to an as-applied violation by the Union in its dealings with AES. SMG's position is not persuasive. We have made clear that hot cargo clauses may be invalid per se if the provision is "'secondary in [its] purpose as well as [its] result.'" *In re Bituminous Coal Wage Agreements*, 756 F.2d at 290 (quoting *A. Duie Pyle, Inc. v. N.L.R.B.*, 383 F.2d 772, 777 (3d Cir.1967)). This per se violation becomes apparent when the clause's "'necessary effect is to make the continuance of the relationship between the [signatory] employer and an independent contractor depend on the latter's decision to become a member of the union.'" *Id.* The SMG/Union agreement fits this description precisely as SMG, the signatory employer, could not subcontract to an independent contractor unless that contractor first contracted with the Union. The violation of § 8(e) was not limited to AES but was generally applicable and therefore is per se invalid. Accordingly, there is ample basis to support the Board's determination that the agreement violated § 8(e) of the Act.

C. The Construction Industry Proviso of Section 8(e)

The Petitioners place most, if not all, of their emphasis on the contention that their agreement is not in violation of the Act because it receives the protection of the "construction industry proviso" to Section 8(e). The proviso states:

> [N]othing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work.

29 U.S.C. § 158(e). There is a dearth of applicable case law that could help interpret the meaning and scope of the proviso.

There are three phrases in the proviso to be considered in this case: The protected agreement must be between a union and (1) an employer in the construction industry; (2) it must relate to work to be done at the site; (3) of the construction, alteration, painting, or repair of building, structure or other work. As to (1) above, the ALJ held that SMG was not an "employer in the construction industry," Decision & Order at 10, but the Board, having found that § 8(e) was violated on another basis, did not decide that issue or the subsidiary question whether it possessed relevant control over labor relations.

The Petitioners argue that the Board could not reach the "construction site" issue without first deciding whether SMG was an employer in the construction industry because SMG's counsel explained at oral argument that the "employer in the construction industry" comes first in the statutory language. Tr. of Oral Argument, Oct. 29, 2002, at 21. We decline to pursue a "chicken or the egg first" argument. The construction industry proviso is inapplicable if either the employer is not in the construction industry or the site is not a construction site. The ALJ decided both adversely to the Petitioners. The Board chose to limit its focus on the construction site. It was free to do so.

Instead, the ALJ found, and the Board agreed, that trade show floors do not constitute construction sites. In challenging this conclusion, the Union focuses on the ALJ's statement that some work of skilled carpenters is needed and performed at the Convention Center, although the amount remains in question. The ALJ further stated that "[t]he work at trade shows requires the same sorts of skills, utilizes the same sorts of materials, and involves the same sorts of tools as traditional, recognized construction work. It is the kind of work, with the kind of skills, that, if performed at a construction project and as a component of that construction, might be exempt under the proviso." Decision & Order at 8.

Other similarities, noted by the ALJ and emphasized by Petitioners, are that "the assignment process is through a hiring hall, the majority of jobs are of short duration, and carpenters who work trade shows are employed by a number of employers." *Id.* at

8-9. The ALJ noted that "there are normally at least two groups of employees working at the Center to set up and break down trade shows, employees represented by the Painters [with whom AES had a contract] and the Carpenters [the Union with which SMG made the agreement]." *Id.* at 9.

Despite the similarities between some trade show work and traditional construction work, the ALJ focused on the requirement in the proviso that "the agreement must apply only to work 'to be done at the site.'" *Id.* The ALJ stated: "The Center would not be referred to as a construction project, in the sense that appears in the legislative history or in the Supreme Court's decision in *Woelke & Romero Framing*. No occupancy inspections occur and neither construction nor zoning permits are required. Hard hats are not worn, and safety boots are not required." *Id.* (footnote omitted). The ALJ summarized his discussion by stating that "the Center is an exhibition hall typically used to display items for sale. The Center is not the subject of construction or building." *Id.*

Having found that a trade show floor did not qualify as a construction site, the ALJ determined that the agreement did not fit within the proviso. *Id.* ("whatever work is performed by the Carpenters on the floor of the Center is not being performed at 'the site of the construction.'"). The Board expressly approved, as it too stated "that the work covered by the agreement was not performed on a construction site." *Id.* at 1. The Petitioners argue that the statutory words "at the site" do not exclude remote job sites. However, in *Woelke & Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 654-62, 102 S.Ct. 2071, 72 L.Ed.2d 398 (1982), the Supreme

Court speaks of the proviso only in terms of a "construction site," and there is no basis to extend "site" beyond the statutory context of the phrase.

Most of Petitioners' fire is reserved for the interpretation applied to the third, and inextricably related, requirement, that the site be "of the construction, alteration, painting, or repair of a building, structure or other work." The word "construction" was interpreted by the Board for purposes of § 8(f) of the Act (the provision allowing pre-hire agreements under certain circumstances) in its decision in *Carpet, Linoleum and Soft Tile Local Union No. 1247,* 156 NLRB 951 (1966) (*Indio Paint*). In that decision, the Board carefully parsed technical, common, and legal definitions of the word "construction" as found in *Construction Review* (a 1957 joint publication of the U.S. Departments of Labor and Commerce), the *Standard Industrial Classification Manual*, and *Mechanics Lien Law* respectively. Amalgamating the various definitions, the Board defined "building and construction" as "the provision of labor whereby materials and constituent parts may be combined on the building site to form, make or build a structure." *Id.* at 959. Using this definition, the Board held that the provision of labor and materials for floor covering installations constitutes building and construction work. *Id.* The *Indio Paint* definition is significant because the parties agree that the Board uses the same standard for "construction" in §§ 8(e) and (f) cases.

Upon examining the proviso's legislative history, the Supreme Court determined that Congress wished to "'preserve the status quo'" regarding agreements

between unions and contractors in the construction industry. *Woelke & Romero Framing,* 456 U.S. at 657, 102 S.Ct. 2071 (quoting *National Woodwork,* 386 U.S. at 637, 87 S.Ct. 1250). According to the Board, that preservation applies to the status quo in the industry as of 1959, the year Congress enacted § 8(e). *Alessio Construction,* 310 NLRB 1023, 1027 (1993). For this reason, there is a historical basis for the focus by the General Counsel of the Board on permanency, as the Departments of Labor and Commerce's 1957 *Construction Review* defines buildings or structures for construction purposes as work "built into or affixed to the land." Br. of Bd. at 32.

In his brief for the Board, the General Counsel argues that "structure" is the critical word in the Board's standard enunciated in *Indio Paint* and that such structure excludes trade show exhibits. Br. of Bd. at 27. He notes that the Board has never treated as a construction site a location where the work provided did not involve building or affixing to the land.[4] Trade

---

[4] In its Reply Brief the Union states that if "construction" is limited to something "built into or affixed to the land" numerous activities previously considered construction work would no longer be covered. The three cases cited by the Union disprove its argument. In *International Union of Operating Engineers, Local Union No. 12 (Tri-Counties),* 131 NLRB 520 (1961), the construction at issue was of streets, sewers, gutters, and utility installations. It is difficult to imagine construction of items more built into or affixed to the land. In *Ohio Valley District Council (Zidell Explorations),* 175 NLRB 887 (1969), the work involved dismantling of ballistic missile sites, which speaks for itself. In *U.S. Abatement, Inc.,* 303 NLRB 451 (1991), the work considered "construction" was the removal of asbestos, and the Board itself

show exhibits, certainly the ones in question, are not built into or affixed to the land; the only building associated with this dispute is the Convention Center. Thus, the Board's brief argues that because the Center is not being constructed or altered, it is not a construction site.

In an analysis that Petitioners vigorously attack, the ALJ distinguished the earlier Board decisions that held that the construction of a retail store fell within § 8(e)'s proviso on the ground that the employer in those cases "was involved in the construction of a building, something tangible and permanent, even installing carpeting." Decision & Order at 8. The Petitioners complain that in interpreting the language of the proviso to require some permanence to the structure, the ALJ and the Board have added a requirement Congress never intended. We do not agree. The contemporary references cited by the ALJ define construction in terms of structures being "built

---

said, "[i]t is evident that the asbestos removal activities in which Respondent is engaged affect the structure of buildings and equipment, such as boilers and pipes, which, after installation, have become an integral part of the structure, itself." *Id.* at 456. Finally, in SMG's Reply Brief, it contends that the Board's intervening decision in *Freeman Decorating Co.*, 336 NLRB No. 1 (2001), is inconsistent with its decision in the current case. SMG's argument is unpersuasive. In *Freeman Decorating*, the Board never reached the "construction" question of the § 8(f) issue before it, and thus the ALJ's discussion of the erection and dismantling of exposition shows in that case was dicta. Petitioners concede as much. That dicta, articulated by an administrative law judge and not addressed by the Board on review, does not render the Board's determination in this case unreasonable.

into or affixed" to the land, which necessarily excludes temporary trade show work. Decision & Order at 9.

The Petitioners suggest that there is no statutory basis for the Board's requirement for a structure. They criticize the Board for ignoring the words "other work" in the proviso while focusing on "site of construction." Br. of Union at 39. However, the Petitioners provide no decisions in which the Board or any court discusses "other work." In such a situation, the General Counsel is not unreasonable in referring to the maxim that "a word is known by the company it keeps." Br. of Bd. at 31.

The Union supports its position by reference to what some courts have deemed to be the legislative intent behind the proviso, which is minimizing jobsite tension within the construction industry. Br. of Union at 37 (citing *Milwaukee & Southeast Wis. Dist. Council of Carpenters v. Rowley-Schlimgen,* 2 F.3d 765, 767 (7th Cir. 1993)). The Union then states that because having different groups at the Center causes friction, it would be arbitrary not to conclude that the Convention Center is a requisite location for application of the proviso. Br. of Union at 38. However, as the Supreme Court said in *Woelke & Romero Framing*, the proviso was "only partly concerned with jobsite friction." 456 U.S. at 662, 102 S.Ct. 2071. Instead, the *Woelke* Court found that Congress was more concerned with preserving the "status quo" in the construction industry. *Id.* at 657, 102 S.Ct. 2071. The Board has concluded that under established principles of statutory construction, the construction industry proviso "should not be given an expansive reading" but should protect only "'those subjects expressly exempted

by the proviso.'" *Local 520 Operating Engineers (Massman Construction),* 327 NLRB 1257, 1257-58 (1999) (quoting *Alessio Construction,* 310 NLRB 1023, 1029 (1993)). The Board's interpretation of the proviso as limited to more traditional notions of construction appears to be consistent with that principle and Congress' purpose.

We are presented with two vastly different interpretations of the construction industry proviso. Under the ALJ's and Board's interpretation of the proviso, the proviso covers, and is limited to, traditional construction sites, such as building homes, offices, and similar relatively permanent structures. Under the interpretation of construction site proffered by the Petitioners, any location where installing, assembling and disassembling occurs feasibly could fit within the construction industry proviso, ranging from construction of intricate movie sets to platforms at malls for performers and the appearance of Santa Claus. Petitioners have produced no evidence that Congress envisioned that movie set builders and the like would fall within the construction industry proviso.

Under the circumstances, where the United States Supreme Court, this court, and no other federal appellate court has addressed the issue of the application of the construction industry proviso to the installing and dismantling of trade show exhibits, we believe it is appropriate to defer to the reasonable statutory interpretation of the Board, the agency primarily charged with the Act's implementation and administration. *See Meyer v. Holley,* 123 S.Ct. 824, No. 01-1120, slip op. at 7 (U.S. Jan. 22, 2003); *Chevron*

U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).[5] We will therefore deny the Petition for Review and grant the Board's cross-application for enforcement.

---

[5] One of the amici, the United Brotherhood of Carpenters and Joiners of America ("UBC"), urges that if we affirm the Board, we limit the Board's decision to the facts of the current case, and adopt a case-by-case, totality of circumstances approach without drawing a broad rule that trade show work does not fall within the construction industry proviso. *See* Br. of UBC at 5. It will be up to the Board to determine the applicability of its interpretation of the construction industry proviso in different circumstances.

APPENDIX D

NATIONAL LABOR RELATIONS BOARD

Cases 4–CE–116–1 and 4–CE–116–2

[Filed August 27, 2001]

South Jersey Regional Council of Carpenters, Local 623, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO *and* Atlantic Exposition Services, Inc.	)
Spectacor Management Group *and* Atlantic Exposition Services, Inc.	)

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND TRUESDALE

On March 16, 2000, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondents filed exceptions and supporting briefs, the General Counsel and the Charging Party

filed answering briefs, and the Respondent Union filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The judge found that the Respondents, Carpenters Local 623 and Spectacor Management Group (SMG), violated Section 8(e) of the Act by entering into an agreement under which SMG would not subcontract work to employers who did not have collective-bargaining agreements with Local 623, and by enforcing that agreement against the Charging Party, Atlantic Exposition Services, Inc.[2] In arriving at

---

[1] The Respondent Union has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] Sec. 8(e) provides, in relevant part, that

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement

that conclusion, the judge found that the Respondents' agreement required SMG to cease doing business with employers who were not signatory to contracts with Local 623 and that it did not have a work preservation objective that would remove it from the proscription of Section 8(e). He also found that the agreement did not come within the construction industry proviso to Section 8(e) because the work in question was not performed on a construction site and because, in any event, SMG was not "an employer in the construction industry."

We agree with the judge, for the reasons stated in his decision, that the Respondents' agreement lacked a work preservation objective, that the work covered by the agreement was not performed on a construction site, and therefore that the agreement was not protected by the construction industry proviso.[3]

---

shall be to such extent unenforceable and void: *Provided*, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work[.]

[3] In his discussion of the construction industry proviso, the judge stated that "The Board has found that union signatory subcontracting clauses, under certain circumstances, are valid when they are aimed at avoiding friction among contractors and subcontractors at the site with their union and nonunion employees, the *Denver Building Trades (NLRB v. Denver Building Trades Council)*, 341 U.S. 675 (1951)) problem." In *Carpenters Local 944 (Woelke & Romero Framing)*, 239 NLRB 241, 250

Accordingly, we affirm his finding that the agreement violated Section 8(e). Because we find the violation on that basis, we need not and do not decide whether SMG was an employer in the construction industry, including whether it possessed relevant control over labor relations.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, South Jersey Regional Council of Carpenters, Local 623, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO, its officers, agents, and representatives and Spectacor Management Group,

---

(1978), enfd. sub nom. *Woelke & Romero Framing v. NLRB,* 654 F.2d 1301 (9th Cir. 1981) (en banc), affd. in relevant part 456 U.S. 645 (1982), which the judge cited, the Board interpreted the Supreme Court's decision in *Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975), to mean that "the construction industry proviso to Section 8(e) permits subcontracting clauses . . . in the context of a collective-bargaining relationship, and possibly even without such a relationship if the clauses are aimed at avoiding the *Denver Building Trades* problem." Thus, the Board did not hold that signatory subcontracting clauses in the construction industry are lawful *only* if they are "aimed at avoiding the *Denver Building Trades* problem." Rather, it held that the proviso also protects union signatory subcontracting clauses negotiated in the context of collective-bargaining relationships. There can be no suggestion, then, that the Respondents' union signatory subcontracting clause is unlawful merely because there was apparently no "*Denver Building Trades* problem" here.

Atlantic City, New Jersey, its officers, agents, successors, and assigns, shall take the actions set forth in the Order.

DECISION

STATEMENT OF THE CASE

BENJAMIN SCHLESINGER, Administrative Law Judge. The complaint in this proceeding[1] presents the novel issue of whether the installation and assembly and dismantling of temporary exhibits at trade shows is work encompassed within the construction industry proviso to Section 8(e)[2] of the National Labor Relations

---

[1] The relevant docket entries are: The charges in Cases 4–CE–116–1 and 4–CE–116–2 were filed on October 13 and 14, 1998, respectively, and the complaint was issued on May 28, 1999. This case was heard in Philadelphia, Pennsylvania, on September 28–29, 1999.

[2] In relevant part, Sec. 8(e) provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the

Act, 1947, as amended, 29 U.S.C. Sec. 151 et seq. Respondents Spectacor Management Group "SMG" and South Jersey Regional Council of Carpenters, Local 623, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO the (Union) or (Carpenters), insist that their agreement prohibiting the subcontracting of that work to a contractor that does not have an agreement with the Carpenters is valid because the work involved is construction work and the provision has a lawful work preservation object.

Jurisdiction is conceded. SMG is a Pennsylvania joint venture which manages public assembly facilities, such as convention centers, on behalf of municipal partners. In the year before the issuance of the complaint, SMG purchased and received goods valued in excess of $50,000 directly from points outside New Jersey. SMG has offices in Atlantic City, New Jersey, and is engaged in providing management services on behalf of the Atlantic City Convention Center Authority "ACCCA." The ACCCA, created by the laws of the State of New Jersey, for many years, at least since 1983, operated and managed Atlantic City's Convention Hall, the original facility on the Boardwalk, now designated as Boardwalk Hall (in 1996, a second facility known as West Hall was opened), a public assembly facility which hosts various events, including the Miss America pageant and the subject of this proceeding, trade shows. (The Boardwalk and West Halls are jointly owned and

---

construction, alteration, painting, or repair of a building, structure or other work.

managed and are referred to collectively as the "Center.") Atlantic Exposition Services, Inc. "AES" is a corporation with offices in Egg Harbor Township, New Jersey, and is engaged in providing general services to trade shows in New Jersey and Pennsylvania. It has a collective-bargaining agreement with Painters District Council 711 ("Painters"), which covers its trade show work in New Jersey. In the year before the issuance of the complaint, AES provided services in excess of $50,000 outside New Jersey. I conclude that SMG and AES are employers within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Questions concerning the jurisdiction of the Carpenters at the Center were not new. The ACCCA had a longstanding collective-bargaining relationship with the Carpenters, covering both its "in house" operation and maintenance "O&M" work and the trade show work, including the work that is disputed here. The agreement[3] prohibited subcontracting of Carpenters' work, as follows:

> The Employer agrees it will not subcontract any of the work described in Article XI as it pertains to exhibitions, or to normal and routine maintenance work as performed in the past,

---

[3] The last fully written agreement, dated October 18, 1983, expired on April 30, 1986, but was extended from year to year, only sometimes in writing, with increases of wages and contributions as agreed upon between the Carpenters and the local Building Contractors Association "BCA."

> which work traditionally has been performed by the Employer's employees at the Convention Center. All such work shall be retained and preserved by Carpenters in accordance with past practice. All such work will be performed by the Employer's employees only, and will not be performed by any subcontractors or the Employer, or its tenants or contractors or subcontractors of tenants.

Under this provision, the Carpenters consistently took the position that certain trade show work was its own work and was successful in protecting its jurisdiction using the grievance procedure as well as two, separate 10(k) awards in which the Board upheld the ACCCA's assignment of the show work in dispute to the Carpenters. *Carpenters Local 623 (Atlantic Exhibit Services)*, 274 NLRB 71 (1985); *Painters Local 1447 (Hargrove)*, 306 NLRB 97 (1992).

At some point in or prior to 1995, the New Jersey Sports and Exposition Authority also became an owner of the Center and in 1995, prior to the completion of the West Hall, determined to manage it through a private management company. SMG was selected; and SMG continued to honor the terms of ACCCA's collective-bargaining agreement until SMG negotiated a new agreement with the Carpenters in 1996. That agreement covered O&M work, which was to be performed by members of the Carpenters who were full employees of SMG, employed 40 hours each week. As an addendum, the parties also entered into a "project-only" agreement, a 3-page document in which SMG agreed to be bound by the current BCA agreement as to all Carpenters' labor, other than the

O&M employees, hired to work on specific projects, such as major renovations or construction projects within the facility.

The project-only agreement also permitted SMG to hire casuals to do trade show work—construction of exhibits, construction of hard wall displays, and the type of work that had traditionally been done by the Carpenters. That was contingent on the success of the Carpenters in negotiating a separate agreement with SMG to cover the work of trade shows. However, although SMG and the Carpenters expressly agreed to negotiate a separate collective-bargaining agreement to cover trade show work, they never did so. Rather, they agreed that, contrary to the no-subcontracting practice that had existed for years, trade show work traditionally performed through the Carpenters' hiring hall could be subcontracted. SMG wrote to the Union on April 15, 1996, describing the agreement to be incorporated into the collective-bargaining agreement:

> Finally, Trade employees who work on a part-time basis or who perform contracted work for SMG (e.g., "show" labor) will work under a Separate Agreement which will be negotiated as soon as is practicable. It is understood and agreed that the Separate Agreement will contain a provision stipulating that in the event that SMG subcontracts the covered work, the work will be subcontracted to a firm which will be [sic] negotiate an agreement with the (Trade) Local having jurisdiction over that work with SMG. The said sub-contractor will be free to negotiate the terms and conditions of the said

agreement and will not be bound by SMG's agreement(s) with the applicable local union.

This is the agreement that the General Counsel contends violates Section 8(e) of the Act.

On September 30, 1998, AES was installing the East Coast Video Show, an annual 3-day exhibit held at the Center in October, pursuant to AES's 3-year agreement with the show producer to act as its general service contractor. In the course of setting up the show, AES employees, represented by the Painters Union, began working from a lift to hang aisle signs at the Center, when Dennis Lott, Respondent's foreman,[4] told Patrick Perrino, AES's owner, if he wanted to avoid an altercation on the floor, to instruct the Painters' employees to come down off the lift and stop hanging aisle signs. That was the Carpenters' work. Lott said that he had already asked the Painters to do that and they were not listening to him. Probably at the same time, SMG General Manager Robert McClintock called Howard Casper, AES's secretary-treasurer, on his cell phone. Casper was also on the floor of the Center, and McClintock told him that he had to assign certain work—the hanging of aisle signs and the erection of the entranceway, the registration counters, and the service desk—that AES had previously assigned to the Painters, to the Carpenters. Otherwise, if AES did not assign that work to the Carpenters, he was going to shut the

---

[4] The counsel for the General Counsel conceded that there is insufficient evidence that Lott was a union steward or agent, as alleged in the complaint, when he spoke to Perrino.

doors, he would remove AES from the building and he would let Casper know if, in the future, he could come back into the building.

Soon after this telephone conversation, Lott told Casper that he had to assign the contested work to the Carpenters and that, if he did not, he was not going to be permitted to work in the building. South Jersey Regional Council of Carpenters business representative Robert Tarby made a similar threat that day. He wanted AES to sign the contract that had been agreed on with other show contractors and, "if we didn't sign the contract, we weren't going to be allowed to work in the building."[5] The next day, McClintock said that the problem could be solved either by asking SMG to hire members of the Carpenters, because SMG had the exclusive right to supply labor in the building, or through a contractor which had an agreement with the Carpenters, because SMG would waive its right to supply labor to such a company. On October 2, McClintock wrote Casper that he reserved its "right to take action . . . seeking financial redress from [AES] and a complete review of [its] right to continue operating" in the Center.

The substance, then of Respondents' actions was to use the SMG–Carpenters' union-signatory clause to prevent AES from doing business in the Center. Not every provision with a "cease doing business" objective

---

[5] In so finding, I do not believe Tarby's denial of this threat, which affirmed what was implicit in his request of Casper that failure sign the contract would leave Casper without work, because he would not have a union contract.

is necessarily unlawful. Contract clauses that fall within the literal proscription of Section 8(e) are nevertheless lawful if they have the primary objective of preserving or protecting work performed by the employees of the employer bound by the contractual provision. Respondents contend that the primary objective of their provision is to preserve bargaining unit work; the General Counsel and AES contend that the clause is secondary in nature. In *NLRB v. Longshoremen ILA*, 473 U.S. 61 (1985), the Supreme Court held that the question of whether an agreement to cease doing business is a lawful work preservation agreement or has a proscribed secondary objective depends on "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the primary employer's] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." *Longshoremen ILA,* supra at 75, quoting *National Woodwork Mfrs. Assn.*, 386 U.S. 612, 644–645 (1967). The Court reaffirmed, *Longshoremen ILA,* supra at 76, its analysis in *NLRB v. Longshoremen ILA*, supra 447 U.S. 490 (1980), in which it explained:

> Under this approach, a lawful work preservation agreement must pass two tests: First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so-called "right of control" test of [*NLRB v.*

> *Enterprise Assn. of] Pipefitters*, [429 U.S. 507 (1977)]. The rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work. [447 U.S. at 504–505.]

The SMG–Carpenters' provision is not limited to addressing the labor relations of SMG vis-a-vis its own employees, but instead seeks to regulate the labor policies of other, neutral employers by requiring them to have agreements with the Carpenters, an objective that is clearly secondary. By its terms, as applied by Respondents, the agreement prohibits SMG from subcontracting work within the Carpenters' jurisdiction to the trade show's owner or producer which hired AES, or to AES, because AES does not have a contract with the Carpenters, and therefore seeks to regulate the labor policies of AES, over which SMG exercises no right of control. The Board has consistently held that such union signatory subcontracting agreements have a secondary, rather than primary, work preservation objective, and are unlawful under Section 8(e). As it stated in *Iron Workers (Southwestern Materials),* 328 NLRB 934, 935 (1999), quoting *Chicago Dining Room Employees (Clubmen, Inc.),* 248 NLRB 604, 606 (1980):

> It is well settled that contract clauses which purport to limit . . . subcontracting to employers who are signatories to union contracts, so-called union-signatory clauses, are proscribed by Section 8(e). Such clauses are viewed as not being designed to protect the wages and job

> opportunities of unit employees, but as being directed at furthering general union objectives and undertaking to regulate the labor policies of other employers.

The union-signatory clause, quoted above, is utterly inconsistent with Respondents' theory that the clause was agreed on solely to preserve work. The clause requires SMG to cease doing business with the trade show exhibitor or AES in order to influence AES's labor relations policies. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 652–653 (1982). The provision was aimed at expanding the Union's reach. In negotiations with AES in 1998, further discussed below, the Carpenters insisted on an agreement covering seven different counties in southern New Jersey, including hotels in and around Atlantic City, where AES had an agreement with the Painters and performed the majority of its jobs,[6] ensuring that its agreement with the Painters would be splintered and that U jurisdiction would be expanded. The Union simultaneously rejected AES's offer to enter into an agreement with the Carpenters for solely the Center. SMG was aware of the positions of the parties to the negotiations. Accordingly, I conclude that the SMG–Carpenters union-signatory agreement was not intended to preserve work but was intended to satisfy the union's objectives elsewhere.

The second of Respondents' defenses is that the work involved in trade shows is excluded by the

---

[6] AES sets up approximately 100 shows in the geographic area, of which about 15–20 are at the Center.

proviso to Section 8(e), which applies "to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work." Regarding whether SMG is "an employer in the construction industry," the record demonstrates that SMG acts as the agent and manager for the Center, which hosts many trade shows as part of its business. These trade shows are booked by a show producer or owner, which enters into a license agreement with SMG for the presentation of the show over a specific period of days. Typically, the show producer or owner in turn enters into an agreement with a general service or trade show service contractor "service contractor," such as AES, to set up the floor plan and common areas for the show and facilitate the participation in the show of the exhibitors, who rent their space from the show's owner or producer. The contractor needs labor to set up the show. The license agreement, which by its terms is also binding on the contractor, provides, among other things, that (1) the licensee shall pay for all "set-up and/or labor expressly not included in the License Agreement"; (2) SMG shall provide certain services at the Center on an exclusive basis;[7] and (3):

> Licensee agrees not to violate or jeopardize any labor agreement entered into by ACCCA, SMG

---

[7] Unfortunately, only a form of the license agreement is in evidence, not the actual agreement under which the Video Show was bound. The services to be provided by SMG to the Video Show are not set forth in the form.

> and/or the Authorities. If any such labor agreement is applicable to Licensee or any of Licensee's employees or independent contractors then Licensee hereby agrees to comply and/or cause its employees and independent contractors to be in compliance with all of the provisions of all such labor agreements. Licensee shall use good faith efforts to prevent all strikes, lockouts and/or labor disputes at the Center.

Before 1965, the exhibitor ordered labor from the ACCCA, which hired employees and then billed the exhibitor for the cost of their services. With SMG's engagement as the management company, SMG took the place of ACCCA and changed the procedure somewhat. Thus, when an exhibitor needed carpenters, it would advise the contractor, such as AES, which would then advise the building's convention service manager (SMG employed four or five convention service managers) of its need for carpenters and how many. SMG paid those carpenters and then billed the contractor for that expense, and the contractor would then be reimbursed by the exhibitor. Subsequently, in February 1997, in anticipation of the opening of the new West Hall, SMG announced to its exhibitors that the Center would not be directly supplying labor for the installation or dismantling of exhibits, but labor would be supplied through the general service contractors. SMG recommended that the exhibitors contact the contractors for information. On June 5, 1997, Andy Minton, SMG's assistant general manager, wrote Casper that SMG was still negotiating the union trade show contracts and that, until new union jurisdictions

were set, SMG would still be working under the prior set of "union guidelines," which included the work "historically done by the carpenter." SMG advised Casper on July 7, 1997, that it retained the exclusive right to provide carpenters to perform trade show work, and it was a violation of the license agreement for Casper to do work utilizing labor other than that provided by SMG. By letter dated November 11, 1997, McClintock wrote AES that, effective January 11, 1998, SMG would no longer be providing carpenter labor directly to service contractors or exhibitors as it had in the past and advised that it would be appropriate for AES to make alternate arrangements to obtain labor to perform those tasks. McClintock added that the Center retained the "right . . . to reassert it's [sic] right to provide this labor on an exclusive basis under terms and conditions it negotiates," if there was a potential for "labor activity which would negatively impact the overall operation" of the Center.

Sometime after, McClintock asked Casper to meet with the Carpenters to see if they could reach an agreement; and so Casper became the spokesperson for a group of general service contractors in negotiations with the Carpenters. Ultimately, he reached an agreement for all the contractors, but not himself, because, among other provisions, he could not agree to the Carpenters' demand that the agreement not be limited to the Center, but cover all show work at all venues throughout a seven-county area in southern New Jersey; and the Carpenters would not accept Casper's offer to enter into an agreement to cover work solely at the Center, on condition that the Painters would give permission. But the other service

contractors signed individual agreements with the Carpenters; and, with the new agreements, instead of ordering labor from SMG, the exhibitors could hire their own employees to install and tear down their exhibits. Signatory contractors were now permitted to obtain labor by calling the Carpenters' hiring hall directly, benefits trumpeted by SMG in a letter to its exhibitors, dated August 18, 1998. Thus, Carpenters-represented employees were employed and paid directly by the service contractors, and SMG was no longer the conduit for the hiring of employees. But, if the service contractor was not a signatory to a collective-bargaining agreement with the Carpenters, SMG announced, "the Atlantic City Convention Center will continue to provide that labor under the pre-existing agreement. This labor will be supplied directly to the Service Contractor at our cost." AES, not being a signatory to the new agreement, was thus still required to obtain its Carpenters' labor from SMG, which continued to arrange for the hire of carpenters under the project-only agreement.

So, as of 1999, SMG permitted subcontracting of all carpentry work and encouraged its service contractors to sign their own contracts with the Carpenters; and those individual contracts resulted in a number of benefits to them over the old ACCCA agreement, including the elimination of double time on weekends, elimination of nonworking personnel, and revised jurisdictional lines which allowed the service contractors to utilize the less-expensive employees represented by the Painters rather than employees represented by the Carpenters on certain jobs. For example, the agreement negotiated by Casper permitted the Carpenters and Painters to share

jurisdiction over the hanging of aisle signs, depending on how they are constructed; and, under certain circumstances, exhibitors are allowed to set up their own areas, using their own employees for work that is outside the jurisdiction of the Carpenters.

Essentially, SMG removed itself from the role of an employer. It became no more than a surrogate for the hire of members of the Carpenters, only if a service contractor refused to comply with the obligations of its unlawful union-signatory subcontracting agreement.[8] Having made the determination that it wanted to remove itself from hiring employees to work on trade shows, and having pursued that determination by announcing that it would permit subcontracting, there is nothing in the record that demonstrates that, as part of SMG's function, it needed to hire anyone to put on a trade show. Rather, it needed labor to maintain its building, and it may need craft labor in the event that it planned to do some major renovations. Otherwise, its sole function is to manage the Center for the purpose of renting its space for conventions and trade shows.

There is no definition of the "construction industry" in Section 8(e), just as there is no definition of the "building and construction industry" as used in Section 8(f), which allows a 7-day waiting period for the purposes of a union-security provision and permits prehire agreements between "an employer engaged

---

[8] There is little in the record that indicates that SMG supervised the work of the carpenters, other than the fact the Lott was employed as a foreman.

primarily in the building and construction industry" and "a labor organization of which building and construction employees are members." *Teamsters Local 83 (Stanley Matuszak)*, 243 NLRB 328 (1979). Congress supplied no reason for the different terminology used in those two sections of the Act, and the legislative history does not mandate an answer for whether either section was intended to cover an employer managing buildings used in the exhibition and trade show industry. Part of the discovery of the intent of Congress begins with the Supreme Court's 1958 decision in *Carpenters Local 1976 v. NLRB*, 357 U.S. 93 (1958), that a union could not engage in a strike or other concerted activity to enforce a "hot cargo" agreement—one that required an employer to boycott the goods or services of another employer with whom the union had a dispute—but employers and union were free to enter into such agreements, and voluntary compliance with them were lawful. Section 8(e), enacted in 1959, was designed to eliminate that loophole, forbidding voluntary agreements. *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 628 (1975). The provision represented a compromise between the positions of the House, which wanted to prohibit all hot cargo provisions, and the Senate, which wanted to outlaw agreements only in the trucking industry. Ultimately, the House conferees prevailed, but the Senate conferees insisted on provisos that exempted the garment industry and "agreements relating to work to be done at the site of a construction project." *Woelke & Romero Framing v. NLRB*, supra at 655. The Court's decision makes clear that there was a uniformity of opinion, as revealed by

the committee report and statements of legislators,[9] that

> These statements reveal that Congress wished "to preserve the status quo" regarding agreements between unions and contractors in the construction industry. *National Woodwork Manufacturers Assn.*, supra . . . . To the extent that subcontracting agreements were part of the pattern of collective bargaining in the construction industry, and lawful, Congress wanted to ensure that they remained lawful. [456 U.S. at 657]

---

[9] Senator John F. Kennedy, who was chairman of the Conference Committee, stated, "The first proviso under new section 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of the construction project." 105 Cong. Rec. 17900 (1959), 2 Leg. Hist. 1433.

Senator Kennedy also said:

> The Landrum-Griffin bill extended the "hot cargo" provisions of the Senate bill, which we applied only to Teamsters, to all agreements between an employer and a labor union by which the employer agrees not to do business with another concern. The Senate insisted upon a qualification for the clothing and apparel industries and for agreements relating to work to be done at the site of a construction project. Both changes were necessary to avoid serious damage to the pattern of collective bargaining in these industries. [105 Cong. Rec. 17899 (1959), 2 Leg. Hist. 1432.]

Indeed, the Court found ample evidence that Congress believed that union-signatory contract clauses were part of the pattern of collective bargaining in the construction industry and noted testimony that such agreements were used extensively by the building trades unions. The Board has also found that the 8(e) proviso: "indicates that Congress sought only to preserve the status quo and the pattern of bargaining in the construction industry at the time the legislation was passed." *Carpenters District Council (Alessio Construction)*, 310 NLRB 1023, 1027 (1993), cited with approval in *Operating Engineers Local 520 (Massman Construction)*, 327 NLRB 1257 (1999), *NLRB v. Denver Building Trades Council*, 341 U.S. 675 (1951), in which the Supreme Court found that picketing a general contractor's entire project in order to protest the presence of a nonunion contractor was an illegal secondary boycott, also contributed to Congress' decision to adopt the 8(e) proviso, albeit Congress' reason was "only partly concerned with jobsite friction." *Woelke & Romero*, supra at 662.

In *Carpenters (Rowley-Schlimgen)*, 318 NLRB 714, 715 (1995), the Board found that the employer, Rowley, sold office products, including supplies, furniture, and draperies. It also designed office interiors, and, as part of that business, it sold and installed floor covering, including carpeting, hardwood, vinyl sheeting, and vinyl tiling at, among various commercial sites, newly erected buildings and existing buildings undergoing renovation or remodeling. In the course of that work, the employer usually subcontracted to one particular firm the work of installing the flooring. The Board then held that the installation of floor covering at construction,

renovation, and remodeling sites is construction industry work of the type performed by special trade contractors. It relied on the definition of construction in *Painters Local 1247 (Indio Paint)*, 156 NLRB 951, 959 (1966), that "the so-called building and construction concept subsumes 'the provision of labor whereby materials and constituent parts may be combined on the building site' to form, make or build a structure." The Board also adopted the definition of construction used in the Standard Industrial Classification (SIC) Manuals for 1957 and 1987 that: "The term construction includes new work, additions, alterations, reconstruction, installations, and repairs." Both SIC manuals recognize the installation of floor covering as a special trade within the construction industry.

The Board then held that, although it is necessary for the purposes of Section 8(f) to show that the employer is primarily engaged in the construction industry, it is unnecessary to do so for the purposes of Section 8(e). If an employer actually performs construction work, it may be covered by the proviso. Thus, the Board wrote, 318 NLRB 714, 715–716:

> It is significant that the application of the construction industry proviso of Section 8(e), unlike Section 8(f), is not conditioned on an employer's being primarily engaged in the construction industry. The 8(e) proviso permits the establishment of union-signatory subcontracting clauses in the construction industry as a means of reducing the tensions that typically arise among the various crafts when union and nonunion labor are assigned to

> the same construction site. Given the relatively short-term nature of construction work, Section 8(f) attempts to assure the ready provision of labor and the prehire establishment of wages, hours, and other terms and conditions of employment in order to avoid the uncertainties and disruptions that would arise if, as is likely, negotiating an agreement took longer than the construction work itself. Thus, the underlying policies as well as the pertinent language of the two subsections differ. Additionally, as the Board observed in [*Carpenters Local 743 (Longs Drug)*], 278 NLRB [440 (1986),] at 442, citing [*Los Angeles Building & Trades Council (Church's Fried Chicken)*], [183 NLRB 1037 (1970)], "[W]hether an employer is 'an employer in the construction industry' within the meaning of the first proviso of Section 8(e) is dependent on the circumstances of each situation, rather than on the principal business of the employer." Accord: *District Council of Carpenters v. Rowley-Schlimgen*, 2 F.3d [765 (7th Cir. 1993)] at 767–769. [Footnote omitted.]

Over Rowley's claim that only a relatively small amount of its entire business was construction site work, the Board found that "a significant absolute amount of [Rowley's] flooring installation work is performed at construction sites" and that, specifically, the two projects where the disputes started were, in fact, "construction projects." *Carpenters (Rowley-Schlimgen)*, supra at 716. In addition, the Board found that Rowley had control over the work force, even though it did not directly employ the floor covering installers, because of its close connection with

the subcontractor, whose owner was concurrently employed by Rowley. In so finding, the Board relied on the fact that Rowley procured its flooring installation contracts at construction sites through competitive bidding and distinguished *Carpenters Chicago Council (Polk Bros.)*, 275 NLRB 294 (1985), on the ground that there was no competitive bidding and that Polk's "carpet sales and installations were principally to home owners of already existing dwellings." *Carpenters (Rowley-Schlimgen)*, supra at 716 fn. 11.

The issue, then, is whether SMG was an employer engaged "in construction work at construction sites during the period for which the unfair labor practice [was] alleged." *Carpenters (Rowley-Schlimgen)*, supra at 716.[10] Thus, it is appropriate[11] to look at,

---

[10] Board law does not provide any specific answers. There is not one binding authority cited by any of the parties that holds that trade show work is construction work. All the decisions in which the proviso been applied involve work performed on permanent buildings and structures, not the type of work that is done here, such as the hanging of an aisle sign which will come down in a few days. Respondents' reliance on *Expo Group*, 327 NLRB 413 (1999), is misplaced. There, the administrative law judge found, in the context of a 8(f) defense, which permits unions and employers to enter into prehire agreements if the employer is *primarily* engaged in the construction industry, and also allows for the expedited application of union-security clauses after just 7 days of employment, rather than the 30-day grace period applicable in all other industries, that an employer in the business of setting up and fabricating exhibits for the trade show and convention industry was not entitled to the 8(f) exemption. The construction work performed by Expo's employees was "incidental to its mission of producing trade shows," Id. at 428, "[e]ven assuming for the sake of analysis that the work of assembling displays and

as the Board did in *Rowley-Schlimgen*, the SIC

exhibits constitutes activity in the construction industry," Id., which the judge found may "literally fall within the meaning of the word construction," Id. at 428–429, Expo was only secondarily engaged, and not primarily engaged, in the construction industry. Id. Thus, that decision did not hold that the work in dispute was construction work. Moreover, the precise issue as to whether the employer was engaged even secondarily in the construction industry was not discussed by the Board, and there is no indication that the parties filed exceptions to that specific conclusion of the administrative law judge. The administrative law judge's decision in *Stage Employees Local 39 (Freeman Decorating),* 1999 WL 33452961 (NLRB Div. of Judges), at 10–11, and the General Counsel's Division of Advice memorandum in Case 10–CA–20488–1–4 (1985) are also not binding. No exceptions were filed to the judge's decision, and so the Board never ruled on it. The analysis of the Division of Advice is simply the position of the General Counsel, no more binding on the Board (or on me) than the brief of the General Counsel in this proceeding. Advice memoranda do not constitute Board law. Finally, the issue of whether a trade show contractor was lawfully entitled to enter into a pre-hire agreement was never reached in *Shepard Decorating Co.*, 196 NLRB 152 (1972), because the administrative law judge determined that the union had previously demonstrated its majority status. It was reached in *Animated Displays Co.*, 137 NLRB 999, 1020–1022 (1962), in which the trial examiner determined that a manufacturer of exhibits for trade shows was not primarily engaged in the construction industry under Section 8(f). The parties, however, apparently did not except to that conclusion and, at *Animated Displays Co.*, supra fn. 1, the Board adopted pro forma the finding of a violation based on the 7-day unionsecurity clause.

[11] Concededly, the answer to at least part of the issue does not depend on the principal business of the employer. But *Rowley-Schlimgen* did discuss the employer's business, as part of "the circumstances."

Manuals, which define the term "construction" as "includ[ing] new work, additions, alterations, reconstruction, installations, and repairs." There is no reference to the trade show or convention service enumerated in the SIC Manuals in any of the functions of the construction industry. Rather, they list under "Miscellaneous Business Services, Business Services, Not Elsewhere Classified" the following businesses: "Convention bureaus," "Convention decorators," "Exhibits, building of: by industrial contractors," and "Trade show arrangement." The newer North American Industry Classification System of 1997 states at Section 23, page 89, that construction

> comprises establishments primarily engaged in the construction of buildings and other structures, heavy construction (except buildings), additions, alterations, reconstruction, installation, and maintenance and repairs. Establishments engaged in demolition or wrecking of buildings and other structures, clearing of building sites, and sale of material from demolished structures are also included. This sector also includes those establishments engaged in blasting, test drilling, landfill, leveling, earthmoving, excavating, land drainage, and other land preparation. The industries within this sector have been defined on the basis of their unique production processes. As with all industries, the production processes are distinguished by their use of specialized human resources and specialized physical capital. Construction activities are generally administered or managed at a relatively fixed place of business,

but the actual construction work is performed at one or more different project sites.

The 1997 Classification System specifically adds "Convention and Trade Show Organizers" (561920) as: "This industry comprises establishments primarily engaged in organizing, promoting, and/or managing events, such as business and trade shows, conventions, conferences, and meetings (whether or not they manage and provide the staff to operate the facilities in which these events take place)."

At the time that SMG made its demand of AES to give the disputed work to the Carpenters, SMG had not competitively bid on the job (nor is there evidence that SMG ever bid competitively on jobs);[12] and there is no indication that it employed one employee in construction work at the Center.[13] The only work being performed on the floor of the Center was by members of the Painters, who were employed by AES, and were doing work, Respondents claimed, that should have

---

[12] *Carpenters (Rowley-Schlimgen)*, supra at 716 fn. 11, holds that the manner in which an employer procures its work is "arguably relevant" to the determination of an employer's status in 8(e) cases.

[13] McClintock testified that, at the time that SMG became the manager of the Center, ACCCA had collective-bargaining agreements with the Carpenters, Painters, Teamsters, Plumbers, Electricians, Stagehands, Laborers, and A.S.M.E. (for the property and maintenance employees), but there is no indication that SMG assumed these contracts or made new contracts with these unions, other than the Carpenters. Moreover, there is no testimony about what work the contracts covered.

been performed by members of the Carpenters, who were not employed by SMG. As a result, SMG told Casper to hire Carpenters to do that work, or else SMG would, or else AES would not work. So, at the time that the dispute occurred, SMG was not even an employer in any industry other than being the manager of a convention or exhibition hall, and was not an employer at a construction site.

As noted above, however, even though SMG is not engaged in the construction industry, either primarily or partially, if it performed its own construction on construction projects, it may still be an "employer in the construction industry" for the purposes of Section 8(e) under the Board's rather broad definition. *Carpenters (Rowley-Schlimgen)* demonstrates that, as do *Longs Drug*, *Church's Fried Chicken*, and *Columbus Building Trades Council (Kroger Co.)*, 149 NLRB 1224 (1964) (all involving construction of a retail store). But, in each of these cases, the employer was involved in the construction of a building, something tangible and permanent, even installing carpeting. Respondents contend that it should make no difference that the type of construction engaged in at trade shows is temporary, not permanent. Indeed, although the construction skills required at trade shows are arguably less than all the skills required of carpenters at a traditional construction project,[14] certain jobs require the skills that carpenters have. And there are other similarities to employment in the construction

---

[14] For example, carpenters at the Center do not need drywall installation equipment, as they would on traditional construction sites.

industry. The carpenters are obtained from the Carpenters hiring hall. The employment is casual, probably a little more casual than in building construction. Typically, it takes 2 days or less to build a show, 2 days for the show to run, and 2 days to dismantle the show, thus requiring approximately 6 days from the time the carpenters enter the building until the time they leave. But, about half of the time, the carpenters who set up a show are not available to return to dismantle the show, because they have been assigned to work elsewhere while the show is going on and their work is not required. Thus, the employees work for short periods of time ranging from 4 hours to 2 weeks and averaging 1 or 2 days on any given show.

The work performed by the carpenters was described differently by the parties. The emphasis by AES was on the ease of the job, whereas, predictably, Respondents emphasized how difficult the job was. Casper described that most of AES's jobs were small events, the majority in hotels, and not in the Center. The vast majority of all the jobs, well in the high 90 percent range, consisted of 10 by 10 or 10 by 20-foot booths, involving no installation and dismantling at all. Most booths are simple pipe and drape, with a piece of carpet, or a popup or a "mag-unit," which the exhibitor supplies, wheeled in and enclosed in a fiber case. It has a spider-like mechanism: when it is removed from the case, it accordions out as a metal truss, and on it is placed Velcro and a sign. The installation, according to Casper, is no more difficult. The layout of the exhibitors' areas is marked on the floor with chalk, tape, or paint. The employees then bring in "metal," which consists of extruded aluminum pipes, and they attach the pipes together and put a

cloth "drape" on the pipes (thus, the industry term of "pipe and drape").[15] Sometimes, hard wall is used to separate the exhibitors' booths, but that is not traditional hard wall, but panels that are slid into portable, freestanding metal supports or panels that interlock. The employees lay carpet in the booths, perhaps move furniture, such as a table, into the booth, and then put a plastic top or skirt on the table. They then move the exhibitors' freight, which is transported in crates, from the dock onto the show floor and into the exhibitors' area, and sometimes do some decorating work, such as painting or hanging signs. When the show is over, that process is reversed, the crates are repacked, and the floor is cleaned and restored to its original condition.

AES did, however, need carpenters from time to time, although Casper did not detail when those needs arose. Respondent supplied that information in abundance, not necessarily for work done for AES,[16] but work performed over the years at the Center, starting with the most monumental of the installations, a two-story house, admittedly modular and one not meant to be lived in, but one that needed the services of skilled workmen to put together. Other

---

[15] The Carpenters do not claim jurisdiction over pipe and drape work at the Center, and thus the contested work in this proceeding represents a very minor portion of AES's work for the Video Show.

[16] In particular, no proof was elicited as to the necessity that skills of carpenters were required to perform the jobs that Lott and McClintock were demanding, one of which was the hanging of a sign from a wire cable.

exhibits are as high as two stories or have multiple levels, requiring stairways and structural supports, so that people can move from level to level. Some exhibits require the building of walls and temporary office structures and one, the construction of a skateboard ramp. Among the less dramatic jobs that carpenters performed were to pry open, repair, and repack the crates that contained the exhibits, lay carpet, bolt exhibits together, hang signs, cut lumber and other materials, build stairs or ramps, install turntables, build stages, erect scaffolding, build docks, and move exhibits. The carpenters who assemble and dismantle the exhibits use the traditional tools of the trade, tools that would be used elsewhere in the construction industry: hammers, screwdrivers, wrenches, pliers, and power drivers or drills. They might also use chalk boxes, nails, bolts, side cutters, Allen wrenches, tape measures, combination squares, hand saws, utility knives, pry bars, ratchets, and cat's paws, kickers and other carpet laying tools. Carpenters utilize various materials at the shows, including laminates, wood, metal, lightweight aluminum and steel, and fiberglass. The Board found in *Atlantic Exhibit*, 274 NLRB 71, 74, that: "Prefabricated displays can be complex, with two stories and stairways. The displays may be packaged in numerous shipping crates, which may require carpentry repair after repeated use. Erection and dismantling of the displays involves the use of nuts, bolts, screwdrivers, pliers, hand tools, and power machinery. The tools and equipment are conventionally used by carpenters rather than displayment [the Painters]."

There is no question that some work of skilled carpenters is needed and performed at the Center,

although the amount remains in question. The work at trade shows requires the same sorts of skills, utilizes the same sorts of materials, and involves the same sorts of tools as traditional, recognized construction work. It is the kind of work, with the kind of skills, that, if performed at a construction project and as a component of that construction, might be exempt under the proviso. Like the construction industry, basic carpentry skills are a prerequisite for a small amount of the work, the assignment process is through a hiring hall, the majority of jobs are of short duration, and carpenters who work trade shows are employed by a number of employers. Similarly, there are normally at least two groups of employees working at the Center to set up and break down trade shows, employees represented by the Painters and the Carpenters.

Because of all these similarities, Respondents contend that the purpose of the Act would be served by including the trade show industry within the scope of the 8(e) proviso. But, in *Rowley-Schlimgen*, the Board was careful to answer the threshold question of whether the work that was performed by the employer was, in fact, work that was construction-industry work. Using the prevailing definitions, the Board found that the sale and contracting of floor covering was a craft that was included within the jobs that the construction industry does. Here, the making of aids to exhibits is encompassed within the trade show industry, but is not what is performed in the construction industry. Centering our attention solely on the work that was disputed, the hanging of aisle signs, the erection of the entranceway and the registration counters and the service desk, this is not work that is associated with building a structure. The

hanging of aisle signs does not even require the skills of a carpenter, who have no monopoly over the climbing on ladders or getting on a lift. The construction of counters and desks is no more than the making of furniture, like a table or a chair or a bookcase. True, there are undoubtedly carpenters' skills required, but this is not building construction. The only disputed item which cannot be categorized and is unusual to the trade show industry is the entranceway, which may be a two-story structure through which the customers of the show enter. But, even that is the kind of structure which could have been made anywhere and transported to the Center for use there. It never became part of the building but was merely temporary.

All parties agree that the proviso requires that the agreement must apply only to work "to be done at the site," as opposed to in a manufacturer's plant. Thus, a union may properly refuse to handle goods prefabricated in a shop away from the site and delivered for installation at the building site. *National Woodwork Mfgs. Assn. v. NLRB*, 386 U.S. 612 (1967). But the language of the proviso says more; it sets forth the kind of work performed at a construction site and thus defines the nature of the site itself. Thus, in *Carpenters (Rowley-Schlimgen)* the Board examined whether the job was being "done at the site of the construction, alteration, painting, or repair of a building, structure or other work," as the proviso insists. The Board specifically found: "Notably, no party disputes that the Greenway Tower Office and Physicians Plus Building projects over which the Respondent initiated the grievances and court action are construction projects." *Carpenters*

(Rowley-Schlimgen), supra at 716. To the contrary, in *Carpenters Chicago Council (Polk Bros.)*, 275 NLRB 294 (1985), the employer was found not to be an employer within the meaning of Section 8(e) because "its carpet sales and installations were limited principally to home owners of already existing dwellings." *Carpenters (Rowley-Schlimgen),* supra at 716, fn. 11.

And so it makes a difference where the work is being performed.[17] In *Rowley-Schlimgen*, buildings were being constructed. The floor covering was installed as part of the construction of the finished building. In *Polk Bros.*, an already existing building was not a construction site within the meaning of the statute, because the dwelling had already been built. Similarly, in this proceeding, whatever work is performed by the Carpenters on the floor of the Center is not being performed at "the site of the construction,

---

[17] SMG contends that "several aspects of the installation work performed by carpenters on trade shows differ not at all from the kind of 'installation' work which they perform on more traditional construction projects (as, for example, the installation of removable selling fixtures in a retail store)." That, of course, is work that is being performed at a traditional construction project and by crafts that are undoubtedly doing something else to the structure. If new selling fixtures were installed in an older building, the installation would not be at a site of construction under *Polk Bros.* That threshold has not even been crossed in this case. Similarly, the question presented is not whether the item that is constructed is permanent or temporary, as much as whether it can reasonably be held as part of "the construction, alteration, painting, or repair of a building, structure or other work," as the proviso requires.

alteration, painting, or repair of a building, structure or other work," as Section 8(e) requires. The Center would not be referred to as a construction project, in the sense that appears in the legislative history or in the Supreme Court's decision in *Woelke & Romero Framing*. No occupancy inspections occur and neither construction nor zoning permits[18] are required. Hard hats are not worn, and safety boots are not required. Rather, the Center is an exhibition hall typically used to display items for sale. The Center is not the subject of construction or building. Show owners and producers renting the building cannot mar the building in any manner. They cannot even drive nails or insert screws or hooks; and, if they should damage the Center, they agree to pay the cost of repair or replacement. For this reason, as Tarby testified, "Velcro is a very common thing used in the convention exhibit industry."

The Board has warned against an expansive reading of the construction industry proviso. *Massman Construction*, 327 NLRB 1257 (1999). The primary purpose of the proviso was to preserve the status quo in the construction industry, not the trade show or exhibition industry. There is no proof in this record that Congress in 1959 had any inkling that the trade show industry existed or that the trade show industry traditionally had contractual union-signatory provisions, which were to be preserved.[19] To the

---

[18] Not even the two-story house required a construction permit.

[19] Whether the industry existed or not is unclear. According to Kenneth Viscovich, a national representative of the United

contrary, in the case at hand, although the practice was not proved to have existed in 1959, the Carpenters had no more than a tradition of prohibiting subcontracting. As a result, neither the language nor the intent of the proviso have been satisfied; and the proviso should not be applied to trade shows at the Center.[20] The Board has found that union-signatory subcontracting clauses, under certain circumstances, are valid when they are aimed at avoiding friction among contractors and subcontractors at the site with their union and nonunion employees, the *Denver Building Trades* problem. *Carpenters Local 944 (Woelke & Romero Framing)*, 239 NLRB 241, 250 (1978), enfd. en banc sub nom. *Associated Builders v. NLRB*, 654 F.2d 1301 (9th Cir. 1981), affd. in pertinent part 456 U.S. 645 (1982); *Colorado Building Trades Council (Utilities Services)*, 239 NLRB 253, 256 (1978).

Brotherhood of Carpenters and Joiners of America, the union's relationship to trade shows "began very early . . . generally through the automobile industry and other type shows that were advertising shows basically, introducing the new models." The union would provide workers for those shows "through [its] construction collective bargaining agreements. And in some areas of the country, still continue to provide workers for this industry through our regular construction collective bargaining agreements." Almost all are prehire agreements, because their genesis was the construction-industry contracts.

[20] I make no finding with respect to AES's current collective-bargaining agreement with the Painters, and another which it agreed to with the Metropolitan Regional Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters Union, covering eight counties in Pennsylvania, both of which have 8(f) prehire and 8(e) subcontracting language.

"What appears critical is that the potential for conflict is likely to arise only when the nonunion laborers are in frequent and relatively close contact with the union craftsmen." *Acco Construction Equipment, Inc. v. NLRB,* 511 F.2d 848, 851 (9th Cir. 1975). At best, all that has been shown here is that jurisdictional disputes arise from time to time at the Center between the Carpenters and Painters over some of the work. There has never been any *Denver Building Trades* problem here, or potential for one, that needed to be solved by the unlawful union-signatory provision agreed on by SMG and the Carpenters.

Additionally, assuming that the Center is a construction site, *Carpenters (Rowley-Schlimgen),* relying on *Longs Drug* and *Church's Fried Chicken,* and *Glen Falls Building Trades Council (Indeck Energy),* 325 NLRB 1084, 1087 (1998), require an inquiry into whether SMG possessed control over any segment of labor relations at the site. The Board found that when the employer in *Longs Drug* decided to build a branch outlet store, reserving actual construction work for itself, it also decided not to be the general contractor on the project. As a result, despite the fact that the carpenters installed fixtures at its new drug stores, it did not control the labor relations on the jobsite. The Board found control in *Rowley-Schlimgen,* because the owner of the subcontractor was concurrently employed by Rowley. Here, SMG determined not to be involved in the hiring of employees to work trade shows. Rather, it ceded all responsibilities to the show owner and producer, the exhibitors, and their service contractors; and at the time that it threatened AES for improperly assigning work, it had no control over AES's employees. Indeed,

unlike all the other 8(e) cases, SMG does not have a proprietary interest in what is being built, such as an additional retail store, or what is being sold, such as carpeting. Instead, the products that are exhibited, and the carpentry work that has aided in the exhibits of those items, do not belong to SMG, which has no interest other than ensuring that the Center obtains its rent and the premises are returned timely and clean of the exhibit. Respondents had the burden of proving that they were entitled to the benefits of the proviso, and more particularly had the burden of proving that SMG controlled the labor relations at the jobsite. *Polk Bros.*, 275 NLRB 294, 296. They did not do so. For this additional reason, SMG was not "an employer in the construction industry" within the meaning of Section 8(e).

Accordingly, the 8(e) proviso does not apply to the work of AES and the conduct of Respondents in entering into, maintaining, and attempting to enforce their agreement violated Section 8(e) of the Act. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, including my observation of the witnesses as they testified and my reading of the briefs

filed by all parties,[21] I issue the following recommended[22]

ORDER

A. Respondent South Jersey Regional Council of Carpenters, Local 623, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Union), its officers, agents, and representatives, shall

1. Cease and desist from

(a) Entering into, maintaining, enforcing, or giving effect to its April 15, 1996 letter of agreement with Spectacor Management Group "SMG" with respect to trade show labor pursuant to which SMG agrees to cease doing business with any other person within the meaning of Section 8(e) of the National Labor Relations Act, 1947, as amended.

(b) Entering into, maintaining, invoking, giving effect to, or enforcing any other agreement, express or implied, whereby SMG ceases or refrains, or agrees to

---

[21] AES's contention in its brief that Respondent violated the Act by insisting on its signing a collective-bargaining agreement covering a seven-county area in New Jersey is rejected. That was not alleged in the complaint as a violation of the Act.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

cease or refrain, from doing business within the meaning of Section 8(e) of the Act with Atlantic Exposition Services, Inc., or any other general service or trade show service contractor at the Atlantic City Convention Center.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its union office in Atlantic City, New Jersey, copies of the attached notice marked "Appendix A."[23] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Union's authorized representative, shall be posted by the Union immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by SMG, if

---

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

willing, at all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Union has taken to comply.

B. Respondent Spectacor Management Group (SMG), Atlantic City, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Entering into, maintaining, enforcing, or giving effect to its April 15, 1996 letter of agreement with South Jersey Regional Council of Carpenters, Local 623, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO, with respect to trade show labor pursuant to which SMG agrees to cease doing business with any other person within the meaning of Section 8(e) of the National Labor Relations Act, 1947, as amended.

(b) Entering into, maintaining, invoking, giving effect to, or enforcing any other agreement, express or implied, whereby SMG ceases or refrains, or agrees to cease or refrain, from doing business within the meaning of Section 8(e) of the Act with Atlantic Exposition Services, Inc., or any other general service or trade show service contractor at the Atlantic City Convention Center.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Atlantic City, New Jersey, copies of the attached notice marked "Appendix B."[24] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by SMG's authorized representative, shall be posted by SMG immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by SMG to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, SMG has gone out of business or closed the facility involved in these proceedings, SMG shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by SMG at any time since September 30, 1998.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that SMG has taken to comply.

---

[24] See fn. 23.

APPENDIX A

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT enter into, maintain, enforce, or give effect to our April 15, 1996 letter of agreement with Spectacor Management Group "SMG" with respect to trade show labor pursuant to which SMG agrees to cease doing business with any other person within the meaning of Section 8(e) of the National Labor Relations Act, 1947, as amended.

WE WILL NOT enter into, maintain, invoke, give effect to, or enforce any other agreement, express or implied, whereby SMG ceases or refrains, or agrees to cease or refrain, from doing business within the meaning of Section 8(e) of the Act with Atlantic Exposition Services, Inc., or any other general service or trade show service contractor at the Atlantic City Convention Center.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

SOUTH JERSEY REGIONAL COUNCIL OF CARPENTERS, LOCAL 623, AFFILIATED WITH UNITED BROTHERHOOD OF

CARPENTERS AND JOINERS OF AMERICA, AFL–CIO

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT enter into, maintain, enforce, or give effect to our April 15, 1996 letter of agreement with South Jersey Regional Council of Carpenters, Local 623, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO, with respect to trade show labor pursuant to which we agree to cease doing business with any other person within the meaning of Section 8(e) of the National Labor Relations Act, 1947, as amended.

WE WILL NOT enter into, maintain, invoke, give effect to, or enforce any other agreement, express or implied, whereby we cease or refrain, or agree to cease or refrain, from doing business within the meaning of Section 8(e) of the Act with Atlantic Exposition Services, Inc., or any other general service or trade show service contractor at the Atlantic City Convention Center.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

SPECTACOR MANAGEMENT GROUP

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 00-3465

[Filed February 22, 2001]

ATLANTIC EXPOSITION SERVICES, INC., Plaintiff,

v.

SMG, ROBERT MCCLINTOCK, and SOUTH JERSEY REGIONAL COUNCIL OF CARPENTERS, LOCAL 623, Defendants.

ORDER

This matter having come before the Court on the Motions to dismiss of Defendants, James Katz, Esq. and Howard S. Simonoff, Esq., of Sagot, Jennings & Sigmond, appearing on behalf of Defendant, South Jersey Regional Council of Carpenters, Local 623, Roberto Rivera-Soto, Esq., James A. Matthews, III, Esq. and Jessica L. Pollock, Esq., of Fox, Rothschild, O'Brien & Frankel, LLP, appearing on behalf of Defendants, SMG and Robert McClintock, John L.

Laskey, Esq., James J. Rodgers, Esq. and Christie M. Callahan, Esq. of Dilworth Paxson LLP, appearing on behalf of Plaintiff, Atlantic Exposition Services, Inc.; and,

The Court having considered the written submissions of the parties, as well as the oral argument of counsel, for the reasons expressed in this Court's Bench Opinion;

IT IS, on this 22nd day of February, 2001, hereby ORDERED that Defendants' motions to dismiss are GRANTED on Counts II, III and IV and DENIED WITHOUT PREJUDICE on Count I.

IT IS further ORDERED that all further proceedings on Count I of the Complaint are stayed pending resolution of the dispute between the parties currently pending before the National Labor Relations Board.

/s/
STEPHEN M. ORLOFSKY
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-4848

[Filed: March 25, 2008]

ATLANTIC EXPOSITION SERVICES INC.; HOWARD CASPER,	)
v.	)
SMG, formerly known as SPECTACOR MANAGEMENT GROUP; ROBERT MCCLINTOCK; SOUTH JERSEY REGIONAL COUNCIL OF CARPENTERS, LOCAL 623.	)
Howard Casper, Appellant	)

SUR PETITION FOR PANEL REHEARING

Present: BARRY and FUENTES, Circuit Judges, DIAMOND, District Judge

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this

court, and no judge who concurred in the decision having asked for rehearing by this panel, the Petition for Rehearing is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: March 25, 2008
lwc/cc: CBG GG JAM JK